Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1995

WILLIAM T. SENTER,

Petitioner,

vs.

HUGHES AIRCRAFT COMPANY, and
ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553
a Labor Union,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERIKA W. SENTER
Attorney at Law
4199 Campus Drive
Suite 700
Irvine, California 92715
tel (714) 854-5309
fax (714) 854-4897

Counsel of Record
for Petitioner
William T. Senter

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QUESTIONS PRESENTED

1.

When a court of appeals decides a case based upon a point or an issue not raised, or briefed, or argued by any party, does the due process right guaranteed to litigants by the Fourteenth Amendment, and/or the common law right of "fair procedure," compel that the parties be given opportunity to present supplementary briefs on that point or issue?

2.

The court below affirmed summary judgment in favor of an employer and a labor union on a claim for breach of a bargaining unit contract brought by a union member under 28 U.S.C. § 185(a) pursuant to the authority of *Vaca v. Sipes*, 386 U.S. 171, decided in 1967. In this era of quiescent "labor-management cooperation" when emasculated unions, struggling to survive under an avalanche of labor-choking company *mergers*, deal with dictatorial employers who decree the *downsizing* of the work force;

(1) when does the power of the labor union to act exclusively on behalf of its membership impinge impermissibly on the individual worker's ability to grieve a breach of the collective bargaining agreement and/or to defend his or her contractually guaranteed employment right, and

(2) what evaluation process must a court undertake to decide whether a union's decision not to pursue a member's grievance qualifies as a "good faith" discretionary judgment so as to preclude a finding that the union breached its duty of fair representation to the worker?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

_____o_____

Petitioner, WILLIAM T. SENTER, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

___o___

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* All parties to the proceedings below are listed in the caption.

OPINIONS BELOW

The appeals court Memorandum of Decision (*infra*, App. 1-6; Appendix "A") is unreported, as is the decision not to rehear the appeal (*infra*, Appendix "B": App. 7)[1]. The opinion of the district court (*infra*, Appendix "C": App. 8-17) is unreported as well.

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JURISDICTION

The court of appeals filed the judgment in question on April 20, 1995 (*infra*, Appendix "A": App. 1). A rehearing was requested, and denial of the Petition for Rehearing was filed on June 7, 1995 (*infra*, Appendix "B": App. 7). Upon Petitioner's application, on August 25, 1995, the Honorable Sandra Day O'Connor graciously granted Petitioner an extension of time to file the instant petition to and including October 5, 1995 (*infra*, Appendix "E" App. 32).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case raises substantial concerns involving both the procedural and the substantial "due process" provision, and, also, the "equal protection" provision of the Fourteenth Amendment to the United States Constitution which states:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny equal protection of the laws. . . ."

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1. One of the pivots of this petition for certiorari is Petitioner's request to the Ninth Circuit Court to rehear his appeal; therefore, said "Petition for Rehearing" is, also, appended hereto (*infra*, Appendix "D": App. 18-31).

Further, this case is concerned with provisions of the written policy of the Ninth Circuit General Order 4.2, which states:

> **"Deciding Cases on Points Not raised and Argued**
> If a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it shall give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon that particular point."

* [As a point of interest and comparison to the Ninth Circuit General Order 4.2, this petition also refers the Court to California Government Code § 68081, which states:

> **"Appellate review; Supplemental briefing; Rehearing**
> Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than a denial for a petition for an extraordinary writ, based on an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." (emphasis added)]

Finally, this case involves concerns pertaining to the federal "employee bill of rights" protection guaranteed to members of labor organizations by 29 U.S.C. § 411(a)(4), which provides:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding. . . ."

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STATEMENT OF THE CASE

The essence of this case is perhaps best summed up by the words Secretary of Labor, Robert Reich, used in his Labor Day, 1995, address to the nation.[2] "Meet the Frayed-Collar Workers Getting the Boot," he said.

Petitioner, William T. Senter ("Senter") "got the boot" not only from his employer and from his union, he, also, "got the boot" from the justice system and from the courts. The relevant facts can be gleaned from portions of the appeals decision (*at, App. 1-6*), the trial court decision in the case [*at, App. 8-12*], and the (denied) petition for rehearing [*App. 18-31*], set forth the background facts.

1. The employer and the breached collective bargaining agreement.

Defendant, Hughes Aircraft Company ("Hughes"), is a major employer in the Southern California area. Until July 10, 1992, Senter was employed as a "Timekeeper A" at Hughes' Microelectronics Systems Division ("MSD") located in Rancho Santa Margarita, California. Hughes produces, and sells, "high tech" aerospace and electronic equipment for military and commercial use. The company is organized into several *groups* and *divisions* (usually associated with particular product lines) which operate out of a number of different facilities (plants) at various locations in Southern California. Within the company, a particular "plant" is customarily identified with the group or division operating the plant. Reference to such entity is often made simply by its location. (*App. 20* and *App. 23-26* and *App. 28-29*).

At all times during his employment, Senter was a member of defendant Labor Union. The terms and conditions of Senter's employment were covered by a collective bargaining agreement ("CBA") between his employer and his union. Said CBA was

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2. Robert B. Reich. Labor Day 1995, Commentary. "Perspective on Labor: Meet the Frayed-Collar Workers Getting the Boot." *Los Angeles Times*, September 4, 1995, B9

commonly referred to as "the Southern California Agreement"[3] because most of the Hughes *groups* and *divisions* operating in Southern California, including MSD, were party to said agreement. (*App. 3* and *App. 8-9*). Relocating "plants," or moving work from one location to another, or establishing new facilities, is not an uncommon occurrence at Hughes. The Southern California CBA, therefore, contained a "successorship" clause that binds any "successor or assignee of the employer" to the terms of that CBA. (*App. 26-27*). In addition, per "Supplemental Agreement # 11," Hughes promised that in the event of a transfer of jobs to a "facility established in the San Diego area," it would "offer" the Union the opportunity to represent the transferred employees "on the same basis as all other bargaining unit employees covered by the current Collective Bargaining Agreement."[4]

For reasons not relevant here, the Union, also, had a separate collective bargaining agreement with Hughes' Industrial Products Division ("IPD") and the Hughes Technology Center ("HTC") located in Carlsbad, California.[5] That separate CBA, was known as "the

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3. Union President, Jackson, averred to the trial court that: "The Southern California Agreement covers a bargaining unit of all production, maintenance, shop clerical employees employed in factory areas, and all employees in the job classifications listed in the Appendices of this Agreement and who are employed by its various facilities including Rancho Santa Margarita], and referred to in NLRB certifications and applicable orders and agreements. Senter was employed at Rancho Santa Margarita, which was part of Hughes' Industrial Electronics Group ("IEG"). In the Appendix of job classifications for IEG, "Timekeeper A" is included.

4. Supplemental Agreement #11, dated November 2, 1991 states, in relevant part:

> "The Company agrees that in the event it may hire or transfer employees in the bargaining unit classifications to any facility established in the San Diego area, it will offer EAST, Local #1553, the opportunity to represent them, on the same basis as all other bargaining unit employees covered by the current Collective Bargaining Agreement."

5. Carlsbad is in the "San Diego area." To wit, it is a municipality in San Diego County, California.

Carlsbad Agreement."[4] (*App. 9* and *App. 28-29*). It covered only the employees working for those two Hughes divisions. However, in early 1992, Hughes made a side agreement with the Union to provide that the Carlsbad Agreement would be integrated "en toto" into the Southern California Agreement. The membership at IPD and HTC agreed to the provision. (*App. 4*).

In late 1991 or early 1992, Hughes informed the Union of its decision to consolidate and merge its MSD operations with its IPD operations and, as a result, to move the MSD product lines from its plant in Rancho Santa Margarita, to its plant in Carlsbad (a move of approximately 50 miles). Hughes explained that the decision was based on the high costs of operating the Rancho Santa Margarita facility, the shrinking business for the MSD product lines, and the greater efficiencies that would result from combining similar product lines in one facility. Hughes told the Union that it intended to have a totally integrated work force in Carlsbad and that the two bargaining units "would become one." (*App. 9*).

Thereafter, representatives from Hughes and the Union met to negotiate over the effects of the "division merger" decision. The negotiations were informally conducted in various restaurants and kept "secret" from the rank and file union membership. Hughes averred, in declarations to the court, that the negotiations focused primarily on the following issues: (1) protecting the seniority rights of the bargaining unit employees at Rancho Santa Margarita; (2) determining who would be transferred to Carlsbad; and (3) integrating the job classifications and wage structures of Rancho Santa Margarita and Carlsbad. Hughes averred that it proposed, and

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4. Hughes' Corporate Manager of Employee and Labor Relations, Kenneth King, averred: "Under the Carlsbad Agreement, the bargaining unit is defined as all factory production, maintenance and warehouse employees as listed in Appendix 'C' of this Agreement and who are employed by its Carlsbad, California Area plants of the Industrial products Division, and Hughes Technology Center, Hughes Aircraft company, and referred to in the NLRB Certification in Case Number 21-RC-6197 and the applicable NLRB Order and Consent Election Agreement. Appendix of the Carlsbad Agreement lists the hourly job classifications covered by such agreement. "Timekeeper" is not a job classification under Appendix B.

the Union agreed that certain "support" job classifications[7] would not be transferred to Carlsbad because they would be duplicative of functions already performed by Carlsbad employees. Timekeeping was one of the job classifications that was not going to be transferred to Carlsbad. Hughes also informed the Union that it would not transfer electrical and plant maintenance employees because those functions were already filled by Carlsbad employees. (*App. 10*).

As a result of their negotiations, Hughes and the Union agreed that when MSD moved to Carlsbad, and the plant in Rancho Santa Margarita closed, 55 MSD bargaining unit functions were to be transferred to Carlsbad. The MSD operations and IPD operations were to be kept separate in the Carlsbad plant, and all of the transferred MSD employees retained their full Rancho Santa Margarita-MSD seniority rights in Carlsbad. (*App. 25-26*). Moreover, Hughes and the Union both agreed that, after the move, the Southern California Agreement was to be applied to, and would continue to operate in, Carlsbad (or at least in the MSD portion of the Carlsbad plant). (*App. 26* and *App. 29-32*). In fact, the Union and Hughes concede that the Southern California Agreement survived the closure of the Rancho Santa Margarita plant. They do not dispute that the MSD portion of the Carlsbad plant is the "successor" to the closed Rancho Santa Margarita plant and the "assignee" of the Southern California Agreement. (*App. 26-27*).

The IPD operations in Carlsbad did not have the job classification of "timekeeper." The Carlsbad Agreement did not require IPD or HTC to have a timekeeper; but, the Southern California Agreement obligated Hughes to provide for unionized timekeeping at MSD and at the other *groups and divisions* (plants) covered by that CBA. (*App. 28*). Senter was MSD's only timekeeper. (*App. 39-31*).

Hughes informed Senter, in March 1992, that he would not be transferred to Carlsbad but would be laid off instead. On July 10, 1992, Senter was one of about 70 bargaining unit employees who

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7. What Hughes meant by "support" jobs was left undefined, but Senter disagreed that timekeeping is a classification. He maintained that the function of timekeeper, which is concerned with the collection and auditing of labor data, is directly related to the work performed by those involved in producing a product.

were laid off and not transferred to the Carlsbad facility.

2. The Union's breach of duty of fair representation.

Upon being informed that he would not be transferred to Carlsbad, Senter met with Union officials in order to remind them that the Southern California CBA expressly requires MSD to have a timekeeper in its bargaining unit, and that when MSD moved to Carlsbad his right to that job would have to move also. (*App. 2*). Prior to his layoff, on March 16, 1992, Senter filed an initial grievance to grieve the fact that Hughes had no right to "delete" his job classification. (*App. 24*). Hughes denied the grievance as premature because Senter had not been laid off. (*App. 10*). The Union agreed and declined to prosecute the grievance further.

Shortly after his layoff, Senter filed another grievance alleging that Hughes violated the Southern California Agreement when he was laid off because his timekeeping position, a bargaining unit job under the Southern California Agreement, was being performed by a non-bargaining unit employee at Carlsbad, which is a direct violation of the CBA.[8] Accordingly, he sought a transfer to the Carlsbad facility. (*App. 10*). He also alleged that, irrespective of any right to transfer to Carlsbad, his job at Rancho Santa Margarita had not ceased when he was laid off. (*App. 29-31*).

The Union filed and processed Senter's grievance in Carlsbad. Pursuant to the terms of the grievance procedure outlined in the Southern California CBA, the Union met with Hughes on July 30, 1992 for the "Step Two" meeting.[9] In addition, the Union met with

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8. Section F(1) of the Southern California CBA, in relevant part, states:

> The Employer agrees that salaried and other non-bargaining unit employees shall not perform work regularly assigned to Bargaining Unit employees . . .

9. "The 'Step Two' grievance meeting shall consist of the following: For the Company: The Department manager (or equivalent level) and a Labor Relations representative.

(continued...)

Hughes for "informal arbitration"[10] on August 15, 1992. (*App. 11*). Though, apparently, the Union had found sufficient substance in Senter's grievance to pass it through these two steps, the grievance process thereafter ground to an unexplained and unwarranted halt. Without giving Senter a reason for the change in attitude, the Union declined to process the grievance to arbitration, professing, simply, that it found the grievance to be meritless. [At the summary judgment motion, the Union provided the explanation that the CBA "specifically provided that Hughes would have the right to close down the Rancho Santa Margarita facility if it saw fit to do so." Moreover, the Union professed, "Senter's layoff did not violate the Southern California Agreement because: (1) bargaining unit employees at Rancho Santa Margarita did not have the right to displace a less senior employee at the Carlsbad facility, and (2) timekeeping work is not bargaining unit work at the Carlsbad facility."] (*App. 11*).

For its part, Hughes said that it denied this grievance for the following reasons: (1) after the MSD operations were transferred, there was no need for a full-time timekeeper at the Rancho Santa Margarita facility; (2) there was nothing in the Southern California Agreement precluding Hughes from shutting down the Rancho Santa Margarita facility and moving its MSD operations to Carlsbad; (3) there was no provision in the Southern California Agreement requiring Hughes to transfer Senter to Carlsbad when the MSD operations were moved; and (4) timekeeping was not a bargaining unit classification at the Carlsbad facility. (*App. 11*).

On September 23, 1992, the Union informed Senter that it would no longer pursue his grievance.

9.(...continued)

For the Union: A Union Business Agent and a Senior Steward certified for the Division where the grievance occurred."

10. "Informal Arbitration: If the grievance is not settled in Step Two, and if it is not being processed in the Group/Division Grievance Resolution Committee, and the Union wishes to process it further, then the grievance may be submitted into informal arbitration."

3. The courts' failure to afford a fair hearing.

Because the Union refused to pursue his grievance against Hughes further, Senter took his cause to the courts. On March 17, 1993, Senter filed a complaint in state court alleging causes of action for breach of the collective bargaining agreement against Hughes, breach of duty of fair representation against the Union, and conspiracy to deny rights under the collective bargaining agreement against both defendants. Later, Senter amended his complaint to add a fourth cause of action for violation of Sections 923 and 1122 of the California Labor Code against both defendants. The Union properly removed this action to federal court on the ground that the amended complaint states a cause of action under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. (*App. 12*).

In November 1993, Hughes and the Union moved for summary judgment in the United States District Court for the Central District of California. Senter opposed their motions. The district court granted summary judgment for Hughes and the Union on the belief that *Vaca vs. Sipes*, 386 U.S. 171, 190-193 instructs that to determine whether a Union's decision not to pursue a member's grievance to arbitration breached the duty of fair representation,

> "the Court need not ask whether Senter's grievance was legitimate -- rather, it need simply determine whether the Union's investigation of Senter's allegations was arbitrary, discriminatory, or in bad faith."

The district court concluded that "(b)ecause the Union did not handle his grievance improperly, Senter has not demonstrated a breach of the duty of fair representation." (*App. 16*).

Senter believed that the district court's judgment was in error and appealed the decision to the Ninth Circuit Court of Appeals, urging, *inter alia*, that determining whether a Union's discretionary judgment not to pursue a member's grievance to arbitration breaches the duty of fair representation, requires the court to evaluate the strength of the grievance. The appeals court agreed with Senter that, under *Peters vs. Burlington N.R.R.*, 931 F. 2d 534 (9th Cir. 1991), the

court has such obligation. (*App.1-2*).

Accordingly, the appeals court professed to have evaluated the strength of Senter's grievance of having a contractual right to have his job moved to Carlsbad when the division he worked for (MSD) relocated to Carlsbad. The court determined, *sua sponte*, without asking for briefing from the parties or hearing argument on the point, that the CBA "does not vest rights in employees by virtue of a particular division they work for, but rather by virtue of their being employed at a particular Hughes plant." (*App. 3*). This *sua sponte* finding and conclusion by the appeals court is not only plainly erroneous and is without any substantiation in fact, it is, also, in contradiction to admitted conduct of the parties and the agreed facts of the case.

To alert the court to its error, Senter filed a timely Petition for Rehearing in the Ninth Circuit Court (*App. 18-31*), setting forth therein all the facts the court overlooked in coming to its *sua sponte* finding.

On June 7, 1995, the court of appeals denied the petition for rehearing (*App. 7*), and let the previously rendered decision stand.

The instant petition for a writ of certiorari to the Ninth Circuit Court followed.

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REASONS WHY THE PETITION SHOULD BE GRANTED

The Court's discretionary jurisdiction is invoked, hereby, on two separate grounds.

(1) This Court is asked to exercise its power of supervision over the Ninth Circuit Court of Appeals under Rule 10(1)(a). Petitioner submits that the appeals court, in declining his petition to rehear the appeal (*infra*, Appendix "D" App. 18-31) after having decided the appeal on a point not raised, not briefed, and not argued by the parties, "has so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of this Court's power of supervision" and order the court below to grant the rehearing.

[Petitioner further submits that the circumstances presented here point so plainly to procedural error, that a grant of certiorari, on the above stated ground, would not require a full hearing before this Court. Summary disposition without oral argument, pursuant to Rule 16-1, for the limited purpose of remanding the case to the Ninth Circuit to rehear the appeal, would be entirely proper.]

(2) Additionally, the petition is "certworthy" under Rule 10(1)(c), for this case presents a ripe and "important question of federal law which has not been, but should be, settled by this Court." To wit: In the nearly thirty years since this Court decided *Vaca vs. Sipes*, has the balance of power between labor and management shifted so decidedly in favor of the employer that the principle of organized labor's "fair representation," enunciated in *Vaca vs. Sipes*, 386 U.S. 171, 190 (1967), can no longer be counted on to adequately safeguard the unionized worker's right of equal access to court?

I. CERTIORARI SHOULD BE GRANTED TO INVOKE THE COURT'S SUPERVISORY POWER

A.

Deciding the Appeal on a Point not Raised, not Briefed, and not Argued, and Denying a Party's Timely Request to be Heard on the Point, so Violates the Right to "Fair Procedure" as to Cry out for an Exercise of this Court's Power of Supervision.

On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary.[11] Rule 10.1(a) recognizes the appropriateness of the grant of certiorari where the federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this courts's power of supervision." In Justice Stevens' words: "As the court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." [12]

Though the right of appeal to a higher court has been held not to be essential to due process in judicial proceedings [*McKane vs. Durston*, 153 U.S. 684 (1893)], the lofty common law principle of "fundamental fairness" embodied in the "Due Process" Clause of the Fourteenth Amendment, dictates that where a hearing before an appellate tribunal is afforded to litigants, such hearing must include an opportunity to present one's views on the points of law and fact upon which the appellate decision is to rest. In *Hannah v. Larche*, 363 U.S. 420 (1960) this Court said: (W)hen governmental agencies

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11. *McNabb v. United States*, 318 U.S. 332 (1943), involving a question of administration the criminal justice in the federal courts, is generally considered as the Court's first recognition of its supervisory power over lower federal court proceedings. See also *Mallory v. United States*, 354 U.S. 449 (1957); *Elkins v. Unites States*, 364 U.S. 206 (1960); *Hobby v. United States*, 468 U.S. 339 (1984)

12. *Florida v. Rodriguez*, 469 U.S. 1, 7, (Stevens, J., dissenting).

adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." Appellate review of a case -- particularly where the review is *de novo,* as it is when a summary judgment is reviewed -- "is a proceeding where binding determinations are made that directly affect the legal rights of individuals." No less a standard of fair play and due process than that imposed upon governmental agencies should attend an appeal hearing in the courts of the federal circuit.

"Due Process" in a given situation may be an elusive concept, but certainly, adequate notice of the legal point or issue upon which an appeals decision is to be based and a reasonable opportunity to present a party's position on such point, are basic both to due process and fair procedure. When such opportunity is not provided by the court below, this Court should, and must, exercise its supervisory power to afford the parties that opportunity.

Of particular import here is the fact that the appeals court -- in deciding the appeal on a point not raised by the parties and not developed in the record -- has disregarded its own written policy. To wit, the Ninth Circuit has a **written policy** that if a panel is considering deciding a case upon the basis of a significant point not raised by the parties, it should consider requesting additional briefing and oral argument.[13]

In this case, the situation is aggravated by the fact that the appeal was decided without oral agrument (see footnote** at, *App. 1*), and additional briefing was specifically requested, via Senter's petition for rehearing, and was denied by the court.

Though the reviewing court has power to affirm a decision on any ground that is fairly presented in the record, to decide a case on a point raised *sua sponte* by the court without giving the parties an opportunity to respond, violates every man's basic sence of fairness. The one restraint on the court's ability to affirm on any ground is that a party on appeal should not be surprised by a new issue on which the party did not have an opportunity to develop a factual record. The Ninth Circuit Court is, in fact, in agreement with that view. See for instance, *United States v. Salazar,* 805 F.2d 1394 (9th

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13. Ninth Circuit, General Order 4.2, set forth hereinabove at page 3.

Cir. 1986), where the court would not affirm a conviction based on a theory it raised *sua sponte* at oral argument when the defendant would be unfairly deprived of an opportunity to respond to the factual allegations pertinent to the theory. That Petitioner was deprived of an opportunity to respond to the factual allegations pertinent to the appeals court's theory of the case, is plainly evident on the record.

Under such circumstances, it is clear that this case **must**, at the very least, be remanded to the Ninth Circuit for further hearings on the appeals court's *sua sponte* theory of the case.

It might interest this Court to know that, in circumstances such as this case presents, the Legislature in California has statutorily imposed the duty on that State's Supreme Court to summarily order a remand. See, *Adoption of Alexander*, 44 Cal 3d 875, 864 (1988), where the California high court, in granting review and ordering a remand to the court below, made pointed to the mandate of California statutory law:

> [California] Government Code § 68081, which provides in pertinent part: "Before . . . a court of appeal . . . renders a decision . . . based upon an issue which was not proosed or briefed by any party to the proceeding, the court **SHALL** afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford such an opportunity, a rehearing shall be ordered upon timely petition of any party. [original emphasis].[14]

B.

The Decision Below is Plainly Wrong

Though the erroneousness of the decision below is not this Court's primary focus in granting certiorari, the decision of the court of appeals, in this case, is so totally devoid of evidentiary support, and

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14. The entire California Government Code § 6808 is set forth hereinabove at page 3.

so unjust, and so plainly wrong, as to render it unconstitutional under the Due Process Clause of the Fourteenth Amendment. A review of the facts of this case, and particularly an examination of the matters set forth in the appended "(Denied) Petition for Rehearing" (*App. 18-31*), will make the denial of *substantial* due process, that occurred here, patently obvious.

Whether the decision of the court of appeals is so totally devoid of evidentiary support as to render it unconstitutional under the substantial Due Process guarantees of the Fourteenth Amendment, turns not the question of sufficiency of the evidence, but on whether the decision rests upon any evidence at all. See, *Washington v. United States*, 357 U. S. 348 (1958), where a federal conviction was reversed without elaboration "because of the insufficiency of the evidence."

Petitioner repectfully submits that there is here no evidence at all to support the decision of the court of appeals. A denial of the substantial due process right has occurred.

C.
A Summary Remand Order is Appropriate

In fact, the decision of the appeals court, particularly in face of the denial of the petition to rehear the appeal, is so clearly erroneous, and so plainly in violation of the Ninth Circuit's own stated rule of procedure, which states:

> "If a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it shall give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon that particular point."

that full briefing and argument before this Court would be a waste of time.

Rule 16.1 proclaims that an appropriate order in a given case "may be a summary disposition on the merits." Accordingly, this Court should grant certiorari and remand the case to the court of appeals so that the matters called to the attention of the appeals

court in the Petition for Rehearing (*infra*, App. 18-31) could be fully briefed, and be considered, and be corrected by the court below in compliance with its stated policy.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE AN IMPORTANT ISSUE

A.

This Case Presents an Important Question of Whether, in this new Era of Employer Dominated "Labor-Management Cooperation," the Unionized Employee's Right of Equal Access to the Court is Abridged by the Wide Latitude Given to a Union's Decision not to Arbitrate the Employee's Grievance.

In the prsent "new world order" of global economic competition and the current spirit of ever-increasing "labor-management cooperation" fueled by the rapidly declining power of the labor union, the time is ripe for this Court to reexamine the issue of when and under what circumstances the individual organized worker's rightful access to the court, to sue his employer for a breach of the employment contract, is impermissibly infringed.

The relationship between the corporate employer and organized labor in America has undergone a significant change in the last ten to fifteen years. When this Court decided *Vaca vs. Sipes*, 386 U.S. 171, in 1967, the ability of organized labor to represent the employment interests of the American worker through collective bargaining was far greater than it is today. In the rush to maximize profits and remain competitive in the new world of the 1990s, the hard-working American employee and wage earner has become the "forgotten American." The restructuring of the American economy, largely through corporate mergers and a downsizing of the workforce, has led to a situation where employers are dominant in the labor market in every sense.

Kevin Phillips, the renowned political analyst and observer of the American scene, describes the present day labor-management relationship as follows:

> "Labor is no longer a threat. . . . Management no longer trucks in strikebreakers from the other side of the country; now they move plants . . . Organized labor, which has diminished into a kind of old-age home for leaders in their 70s with bigger memories than muscles, may now be on the verge of a generational change . . . But, today's imbalance in favor of business and finance gives blue-collar America a chance to pitch a new social contract, conjoining frayed white-collar America in a new shake for the ordinary employee. "[15]

In the restructured economy of the 1990s, new guidance from the Court is needed on the respective rights and duties of employers, workers, and labor unions when a breach of the employment contract, i.e., collective bargaining agreement, is alleged. In *Vaca vs. Sipes, supra,* the Court directed that a unionized worker has access to the court to sue his employer for the breach only if he or she can first show that the union breached its duty of "fair representation" in not prosecuting the union member's grievance.

B.

The Present, Nearly Unfettered Discretion the Courts accord a Union's Decision not to Proceed with a Worker's Grievance, Improperly Restricts the Union Member's Right to Sue.

That a Union member has severely restricted his individual right of access to the court in exchange for the collective power of his Union, is set down in *Vaca vs. Sipes* "fair representation" doctrine. Union members have access to the courts to sue their employers over an alleged breach of the collective bargaining agreement, only if the union member can first demonstrate that the Union has breached its duty of fair representation to the member.

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15. Kevin Phillips. *Los Angeles Times,* "Opinion" Section, "Blue and White Collar Labor: Fighting Big Interests." September 3, 1995

The basis and scope of the duty of "fair representation was explained by this Court in *Del Costello vs. Teamsters* 462 U.S. 151, 164, fn. 14 (1983) as follows:

> The duty of fair representation exists because it is the policy of the national Labor Relations Act to allow a single labor organization to present collectively the interests of all employees within a unit, thereby depriving the individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the the duty of the representative organization to serve the interests of all its members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Over the years since *Vaca* and *Del Costello*, the courts have accorded a union extremely wide latitude in the representation of its members. Courts have been particularly reluctant to interfere with a union's "decision" (judgment) not to pursue a grievance absent a showing of a union's arbitrary exercise of its power. For instance, the duty of fair representation is not breached by mere negligence. *Castelli v. Douglas Aircraft Co.*, 752 F2d 1480 (9th Cir. 1985); See also, *Steelworker's v. Rawson*, 495 U.S. 362 (1990) instructing that a union does not owe a duty of care to its members. The district court below relied on *Fristoe vs. Reynolds Metals*, 615 F2d 1209 (1980) for the proposition that a court need not even examine a union's expression of a "judgment" to determine whether the duty of fair representation has been breached. (*App. 16*).

The logical result of this unfettered discretion granted the union to make "judgment calls" as to whether to pursue a member's grievance, is to deny the union member the right to sue his employer over his employment situation.

It is respectfully submitted that such unfettered control by the union over an employee's grievance amounts to an improper

restriction of the employee's constitutional guaranteed right of equal protection under the law, and equal access to court. It also violates the rights guaranteed to members of labor oranizations by 29 U.S.C. § 411(a)(4), which provides:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding. . . ."

C.

The Shield of "Fair Representation" Accorded a Union Should not Accrue to the Benefit of an Employer who Violates the Provisions of a Collective Bargaining Agreement.

The result of the Appellate Court's decision to ignore the evidence and to uphold the Union's right to exercise discretionary judgment despite convincing evidence of the Union's failure to represent the interests of its wronged member fairly, improperly shields the defendant employer from the consequences of its wrongful actions.

Petitioner's grievance, in this instance, represented, in fact, no threat at all to the continued existence or survival of the Union, nor would the proper prosecution of his grievance have an adverse effect on the rights of any other Union member. Simply because Petitioner's case was unique, and pursuing the grievance to full arbitration may have been a significant economic drain on the shrinking resources of the Union, is insufficient justification for declining to represent on the aggrieved Petititoner's claim. Under such circumstances, to invoke the shield of protection afforded the Union in no way guarantees the survival of the Union. It merely lets the "guilty" employer go free.

In the face of the unprecedented economic and industrial changes that have taken place over the last decade or so, our laws

must assure that economically powerful employers, such as Hughes, understand that they may not continue, at their arrogant and arbitrary whim, to violate collective bargaining agreements with the knowledge that they can do so with impunity.

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CONCLUSION

In his recent Labor Day 1995 commentary, Secretary of Labor Robert Reich observed that "new laws and rules are needed." This case is a rare and timely opportunity for this court to provide guidance and instruction on what such "new laws and rules" are, or should be.

WHEREFORE, for these various reasons, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

OCTOBER 3, 1995

Respectfully submitted,

ERIKA W. SENTER
Attorney at Law
4199 Campus Drive
Suite 700
Irvine, California 92715
tel (714) 854-5309
fax (714) 854-4897

Counsel of Record
for Petitioner
William T. Senter

APPENDIX "A"

APPEALS COURT,
MEMORANDUM OF DECISION

FILED
April 20, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM T. SENTER, Plaintiff-Appellant,	)	No. 94-55359
v.	)	D.C. No. CV-93-02252-KN
HUGHES AIRCRAFT COMPANY, ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553, a Labor Union, et al., Defendants-Appellees.	)	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Submitted April 3, 1995**
Pasadena, California

Before: NOONAN, O'SCANNLAIN, and LEAVY, Circuit Judges.

William Senter ("Senter") appeals from the district court's summary judgment in favor of defendants Hughes Aircraft Co.

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* This disposition is not suitable for publication and may not be cited to or by the courts of this circuit except pursuant to 9th Cir. R. 36-3.

** The panel unanimously finds this case appropriate for submission on the briefs and without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

("Hughes") and Electronic and Space Technicians Union, Local 1553, AFL-CIO ("Union"). Senter argues that the district court erroneously: (1) granted summary judgment in favor of Hughes on his claim alleging layoff in breach of the collective bargaining agreement and in favor of the Union on his claim for breach of its duty of fair representation by failing to pursue his grievance against Hughes to final arbitration,[1] (2) concluded that his state law claims under Cal. Labor Code §§ 923 and 1122 were preempted by § 8 of the National Labor Relations Act ("NLRA"), and 3 denied his motion for reconsideration.

(1) **Senter's Claims against Hughes and the Union**

A good faith discretionary judgment of the Union not to pursue Senter's claim to final arbitration precludes a finding of breach of its duty of fair representation even if that judgment was erroneous or negligent. *Stevens v. Moore Business Forms, Inc.*, 18 F. 3d 1443, 1447-48 (9th Cir. 1994). In order to determine whether the Union's decision qualifies as a good faith discretionary decision we first evaluate the strength of Senter's grievance against Hughes. *Peters v. Burlington N.R.R.*, 931 F. 2d 534, 541 (9th Cir. 1991).

Senter makes two breach of contract contentions:

The first is based on rights he believes he has under the Southern California Collective Bargaining Agreement ("Southern California Agreement"). After being notified of the transfer of the Microelectronic Systems Division to the Carlsbad Plant, Senter met with Union officials in order "to remind them that the Southern California CBA expressly requires MSD (Microelectronic Systems Division) to have a timekeeper in its bargaining unit." Accordingly, he argues that when Hughes moved the Microelectronic Systems Division to Carlsbad, his unionized timekeeper job and his right to that job would also move.

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1. Senter brought these claims under 28 U.S.C. § 185 (a) which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Southern California Agreement, however, does *not* vest rights in employees by virtue of the particular division they work for, but rather by virtue of their being employed at a particular Hughes' plant. In the same paragraph of the Southern California Agreement which Senter relies on to claim that timekeeping is part of the bargaining unit, the Agreement also provides that the bargaining unit is defined by the *plants* it covers, and not by employment in particular Hughes' product lines or divisions:

> BARGAINING UNIT
>
> The Employer recognizes the Union as the sole and exclusive Bargaining Agent for all production, maintenance, shop clerical employees employed in factory areas, and all employees in the job classifications listed in the Appendices of this Agreement and *who are employed in its El Segundo, Fullerton, Newport Beach, [sic] Santa Margarita, Malibu, Torrance, Canoga Park, Long Beach, Irvine area plants*, and the Corporate Headquarters located in Los Angeles, CA, and referred to in NLRB certifications and applicable orders and agreements. Excluded from the Bargaining Unit are all supervisors, all administrative, professional, engineering and office employees, confidential employees, all plant protection and security employees, and all Finance Department employees, *except timekeepers*, all welders and maintenance electricians. (Emphasis added.)

The Southern California Agreement, therefore, by its terms protects Senter's unionized timekeeper job only at the Rancho Santa Margarita Plant and other plants covered by that agreement to which Senter may have seniority bump rights. Senter's claim that the Southern California Agreement requires that Hughes unionize timekeeping for the Microelectronic Systems Division operations when moved to a facility not covered by the Southern California Agreement is unfounded.

Article II, Section B of the Southern California Agreement provides that, "[M]anagement shall have the right . . . to determine the extent to which the Plants or any unit of the Plants shall be operated or shut down." Senter does not challenge Hughes' right to close the Rancho Santa Margarita Plant and move the

Microelectronic Systems Division operations to the Carlsbad-Plant. Hughes had no obligation to transfer him under the Southern California Agreement.

Senter also contends that he has a right to timekeeping under the integrated collective bargaining agreement resulting from the adoption of the Carlsbad Agreement "en toto" as an addendum to the Southern California Agreement. However, even if Senter is correct, and the integration did apply all of the provisions of the Southern California Agreement to the Carlsbad Plant, and therefore made timekeeping part of the bargaining unit at Carlsbad, Senter has presented no evidence indicating that he had any bump rights, or other contractual rights, to that job at the Carlsbad plant.

In short, the Union and Hughes presented evidence that timekeeping at Carlsbad was not unionized, and that even if timekeeping had been unionized, Senter would have had no contractual rights to that position. In view of the weakness of Senter's claims, the Union's decision not to pursue Senter's claim to final arbitration due to its lack of merit was a legitimate exercise of discretionary judgment. *Cf., Burlington N.R.R.*, 931 F. 2d at 540. Having reviewed Senter's additional claim of a conspiracy between Hughes and the Union to deprive him of his position and finding it meritless, we hold that Senter has failed to present sufficient evidence raising a genuine issue of material fact regarding the Union's breach of its duty of fair representation. Summary judgment in favor of the Union and Hughes was appropriate.

(2) **Preemption Under the NLRA**

Senter argues that the district court erred in ruling that his state law claims under Cal. Labor Code §§ 923 and 1122[2] were preempted

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2. Section 923 provides:

> [I]t is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid.

(continued...)

by federal law, and that the district court abused its discretion by not remanding these claims to state court after granting summary judgment in favor of the defendants on his other federal claims. Senter's arguments are meritless.

When a federal court determines that removal jurisdiction was *improvidently* granted over a case involving claims all of which are arguably preempted by sections 7 or 8 of the NLRA, a district court should remand to the state court to determine whether such claims are in fact preempted. *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1400-02 (9th Cir. 1988). In the present case, however, removal of the case was *not* improvidently granted since the district court had federal subject matter jurisdiction over Senter's claims against Hughes and the Union under 28 U.S.C. § 185(a). Once the district court resolved these federal claims, it still possessed discretionary jurisdiction over Senter's remaining state claims under its supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

The district court correctly determined that Senter's state claims would be preempted by Section 8 of the NLRA, 29 U.S.C. § 158.[3]

2.(...continued)
Section 1122 provides:

> Any person who organized an employee group which is financed in whole or in part, interfered with or dominated or controlled by the employer or any employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby. Said injured party shall recover the damages sustained by him and the costs of suit.

3. The pertinent part of § 8 of the NLRA, 29 U.S.C. § 158 provides:

> (a) It shall be an unfair labor practice for an employer -- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .
> * * * *
> (b) It shall be an unfair labor practice for a labor organization or its agents -- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . .

It is well settled law that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 616 (9th Cir. 1981) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)).

Senter presents no meritorious argument indicating that the district court's decision to exercise supplemental jurisdiction was an abuse of discretion.

(3) **Denial of Motion for Reconsideration**

We conclude that the district court did not abuse its discretion in denying Senter's motion for reconsideration in light of Senter's failure: 1) to pursue discovery diligently prior to summary judgment, 2) to move for a Fed. R. Civ. P. 56(f) continuance *prior* to summary judgment, and 3) to provide the court with any grounds sufficient to merit reconsideration as provided by the district court's Local Rule 7.16. *Qualls By & Through Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir. 1994) (internal quotation omitted; emphasis in original), and *see* discussion in District Court's Order Denying Senter's Motion for Reconsideration and Hughes' Request for Sanctions, ER at 100-102.

AFFIRMED.

APPENDIX "B"

APPEALS COURT
ORDER DENYING A REHEARING

FILED
June 7, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM T. SENTER, Plaintiff-Appellant,	)	No. 94-55359
	)	D.C. No.
v.	)	CV-93-02252-KN)
HUGHES AIRCRAFT COMPANY, ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553, a Labor Union, et al., Defendants-Appellees.	)	ORDER

Before: NOONAN, O'SCANNLAIN, and LEAVY, Circuit Judges.

The Petition for rehearing is DENIED.

APPENDIX "C"

TRIAL COURT ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Filed, December 15, 1993
Entered, December 22, 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM T. SENTER, Plaintiff, v. HUGHES AIRCRAFT CO. et al Defendants.	)	CV 93-2252 KN (GHKx) ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

After considering the papers submitted, the Court **GRANTS:** (1) defendant Hughes Aircraft Company's ("Hughes") motion for summary judgment; and (2) defendant Electronic and Space Technicians Local 1553's ("the Union") motion for summary judgment. Hughes and the Union are each **ORDERED** to prepare and file a proposed judgment that comports with the facts and law contained herein **within (20) days of the date of this order.**

I. Findings of Fact

The following facts are not in material dispute.

Until he was laid off on July 10, 1992, plaintiff William T. Senter ("Senter") was employed by defendant Hughes as a "Timekeeper A" at its Microelectronics Systems Division ("MSD") in Rancho Santa Margarita, California. During his employment, Senter was a member of defendant Union, and the terms and conditions of his employment

were covered by a collective bargaining agreement which was entered into between the Union and Hughes ("the Southern California Agreement")[1]

The Union also entered into a separate collective bargaining agreement with Hughes' Industrial Products Division and the Hughes Technology Center that covers Hughes' employees in Carlsbad, California ("the Carlsbad Agreement").[2]

In late 1991 or early 1992, Hughes informed the Union of its decision to move the MSD product lines from Ranch Santa Margarita to Carlsbad. Hughes explained that its decision was based on the high costs of operating the Rancho Santa Margarita facility, the shrinking business for the MSD product lines, and the greater efficiencies that would result from combining similar product lines in one facility. King Decl., ¶ 4, at 3. Hughes intended to have a totally integrated work force in Carlsbad, and thus the two bargaining units under the Southern California Agreement and the Carlsbad Agreement "would become one." Id.

Thereafter, representatives from Hughes and the Union met to negotiate over the effects of Hughes' decision to shut down its Rancho Santa Margarita facility. Id., ¶ 5, at 3; Jackson Decl., ¶ 7, at

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1. The Southern California Agreement covers a bargaining unit of "all production, maintenance, shop clerical employees employed in factory areas, and all employees in the job classifications listed in the Appendices of this Agreement and who are employed by its various facilities including Rancho Santa Margarita], and referred to in NLRB certifications and applicable orders and agreements." Jackson Decl.., Exh. 151, at 1 (copy of the Southern California Agreement). Senter was employed at Rancho Santa Margarita, which was part of Hughes' Industrial Electronics Group ("IEG"). In the Appendix of job classifications for IEG, "Timekeeper A" is included.

2. Under the Carlsbad Agreement, the bargaining unit is defined as follows: "all factory production, maintenance and warehouse employees as listed in Appendix 'C' of this Agreement and who are employed by its Carlsbad, California Area plants of the Industrial products Division, and Hughes Technology Center, Hughes Aircraft company, and referred to in the NLRB Certification in Case Number 21-RC-6197 and the applicable NLRB Order and Consent Election Agreement." King Decl., Exh. B, at 10 (copy of the Carlsbad Agreement). Appendix of the Carlsbad Agreement lists the hourly job classifications covered by such agreement. "Timekeeper" is not a job classification under Appendix B.

3. These negotiations focused primarily on the following issues: (1) protecting the seniority rights of the bargaining unit employees at Rancho Santa Margarita; (2) determining who would be transferred to Carlsbad; and (3) integrating the job classifications and wage structures of Rancho Santa Margarita and Carlsbad. Hughes proposed, and the Union eventually agreed, that for purposes of efficiency, certain "support" job classifications would not be transferred to Carlsbad because they would be duplicative of functions already performed by Carlsbad employees. Timekeeping was one of the job classifications that was not going to be transferred to Carlsbad. Similarly, Hughes also informed the Union that it would not transfer electrical and plant maintenance employees because those functions were already filled by other Carlsbad employees.

As a result of these negotiations, Hughes informed Senter in March 1992 that he would not be transferred to Carlsbad, but that he would be laid off instead. Thereafter, but prior to his layoff, Senter filed a grievance under the Southern California Agreement. Hughes denied the grievance as premature because Senter had not been laid off.

On July 10, 1992, Senter was one of about 79 bargaining unit employees who were laid off and not transferred to the Carlsbad facility. Shortly thereafter, Senter filed another grievance in which he alleged that Hughes violated the Southern California Agreement when he was laid off because his timekeeping position, a bargaining unit job under the Southern California Agreement, was being performed by a non-bargaining unit employee at Carlsbad. Accordingly, Plaintiff sought a transfer to the Carlsbad facility.

The Union filed and processed Senter's grievance against Hughes. Pursuant to the terms of the grievance procedure outlined in the Southern California Agreement, the Union met with Hughes on July 30, 1992 for the "Step Two" meeting.[3] In addition, the Union

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3. "The 'Step Two' grievance meeting shall consist of the following:

For the Company: The Department manager (or equivalent level) and a Labor Relations representative.

For the Union: A Union Business Agent and a Senior Steward certified for the Division where the grievance occurred." Jackson Decl., Exh. 151, at 89.

met with Hughes for "informal arbitration"[4] on August 15, 1992.

After considering the arguments, Hughes denied this grievance for the following reasons: (1) after the MSD operations were transferred, there was no need for a full-time timekeeper at the Rancho Santa Margarita facility; (2) there was nothing in the Southern California Agreement precluding Hughes from shutting down the Rancho Santa Margarita facility and moving its MSD operations to Carlsbad; (3) there was no provision in the Southern California Agreement requiring Hughes to transfer Senter to Carlsbad when the MSD operations were moved; and (4) timekeeping was not a bargaining unit classification at the Carlsbad facility.

The union then reviewed Hughes' decision regarding the grievance and considered correspondence from Senter and his attorney on this issue. The Union decided that the transfer of work from the Rancho Santa Margarita to the Carlsbad facility did not violate the Southern California Agreement because this Agreement specifically provided that Hughes would have the right to close down the Rancho Santa Margarita facility if it saw fit to do so.[5] Moreover, the Union decided that Senter's layoff did not violate the Southern California Agreement because: (1) bargaining unit employees at Rancho Santa margarita did not have the right to displace a less senior employee at the Carlsbad facility, and (2) timekeeping work is not bargaining unit work at the Carlsbad facility. Accordingly, the Union concluded that Senter's grievance had no merit and declined to pursue the grievance to arbitration.

Despite determining that Senter's grievance lacked merit, the Union still attempted to assist Senter by asking Hughes to transfer Senter to Carlsbad to handle additional timekeeping requirements

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4. "Informal Arbitration: If the grievance is not settled in Step Two, and if it is not being processed in the Group/Division Grievance Resolution Committee, and the Union wishes to process it further, then the grievance may be submitted into informal arbitration." Jackson Decl., Exh. 151, at 90.

5. Article II, Section B of this Agreement specifically states that: "Provided such does not violate other terms of this Agreement, management shall have the right . . . to determine the extent to which the Plants or any unit of the Plants shall be operated or shut down." Jackson Decl., Exh. 151, at 4.

because of the merger. Hughes informed the Union that it did not need an additional timekeeper since it already had one at Carlsbad and only 55 Rancho Santa Margarita employees were to be transferred. On September 23, 1992, the Union informed Senter that it would no longer pursue his grievance.

On March 17, 1993, Senter filed this action in state court alleging causes of action for breach of the collective bargaining agreement against Hughes, breach of duty of fair representation against the Union, and conspiracy to deny rights under the collective bargaining agreement against both defendants. In April 1993, Senter amended his complaint to add a fourth cause of action for violation of Sections 923 and 1122 of the California Labor Code against both defendants.

In April 1993, the Union properly removed this action to federal court on the ground that the amended complaint states a cause of action under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.

Defendants Hughes and the Union now move for summary judgment. Senter opposes their motions. The Court **GRANTS** summary judgment for Hughes and the Union for the reasons set forth below.

II. Legal Analysis

A. Summary Judgment Is Appropriate Where There Is No Genuine Issue of Material Fact And The Moving Party Should Prevail As A Matter Of Law

The Court should enter summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc., Rule 56(c). A dispute as to a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

B. Senter's State Law Claims Arising Under The Collective Bargaining Agreement Are Preempted by Section 301 Of the LMRA

As a preliminary matter, the Court clearly has jurisdiction over this action under Section 301 of the LMRA, which confers upon the district courts jurisdiction to enforce collective bargaining agreements

in industries affecting interstate commerce. Indeed, "all rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce arise under Federal law. State law does not exist as an independent source of private rights to enforce collective bargaining contracts." Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1212 (9th Cir. 1980) (citing Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers, 376 F.2d 337, 339-40 (6th Cir. 1967), aff'd, 390 U.S. 557 (1968)). See also Castaneda v. Dura-Vent Corp., 648 F.2d 612, 616 (9th Cir. 1981) (holding that "jurisdiction exists under section 301 only to the extent that the dispute is focused upon and governed by the terms of the collective bargaining agreement.").

In this case, Senter asserts three causes of action that arise out of Senter's alleged rights under the Southern California Agreement: (1) breach of the collective bargaining agreement against Hughes, (2) breach of the duty of fair representation against the Union, and (3) conspiracy to deny rights under the collective bargaining agreement against both defendants. The Court finds that all three causes of action can be recharacterized as claims under Section 301 of the LMRA.

C. Hughes And The Union Prevail As A Matter Of Law On Senter's Cause Of Action For Violation Of California Labor Code Sections 923 And 1122 Because This Claim Is Preempted By The National Labor Relations Act; As Such, The National Labor Relations Board Has Exclusive Jurisdiction Over Such Claim

Senter's remaining claim is one for violation of California Labor Code Sections 923[6] and 1122[7] that set forth California's public policy

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6. Section 923 provides: "In the interpretation and application of this chapter, the public policy of this State is as follows: Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his

(continued...)

prohibiting the commission of unfair labor practices by unions and employers against employees. See, e.g., Chavez v. Sargent, 52 Cal. 2d 162, 205 (1959) (holding that Section 1122 is in pari materia with Section 923). Specifically, Senter claims that the Union failed to act independently of Hughes for Senter's protection, and was "supported, financed, interfered with, dominated and/or controlled by" Hughes during the defendants' negotiations concerning the merger of the Rancho Santa Margarita and Carlsbad MSD work forces. Notice of Removal, Exh. 2, at 11-12 (copy of first amended complaint).

The Court finds that this claim essentially alleges that both the Union and Hughes have engaged in unfair labor practices under Section 8 of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158.[8] The law is well-settled that "[w]hen an activity is arguable subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." Castaneda, 648 F.2d at 616 (citing San Diego

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6.(...continued)
employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or mutual aid or protection."

7. Section 1122 states that: "Any person who organizes an employee group which is financed in whole or in part, interfered with or dominated or controlled by the employer or any employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby. Said injured party shall recover damages sustained by him and the costs of suit."

8. Section 8(a) provides in pertinent part: "It shall be an unfair labor practice for an employer -- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29 U.S.C. § 158(a) (1) and (2).

Section 8(b) provides in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents -- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . ." 29 U.S.C. § 158(b) (1) (A).

Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959)).

Accordingly, the Court holds that Senter cannot prevail on this claim because, as a matter of law, the Court has no subject matter jurisdiction over this claim.

D. Both Hughes And The Union Prevail On Senter's Remaining Section 301 LMRA Claims

1. Senter Cannot Maintain His Claims Against Hughes Because He Failed To Proceed To Arbitration Against Hughes

The law is well-settled that when a collective bargaining agreement provides that arbitration will be the exclusive remedy for employee grievances, an employee may not bring an action against the employer instead of seeking arbitration, except where the employee shows that the Union breached its duty of fair representation by failing to pursue arbitration. See Fristoe, 615 F.2d at 1214-1215; Vaca v. Sipes, 386 U.S. 171, 184 (1967). Accord Green v. Hughes Aircraft Co., 630 F. Supp. 423, 427 (S.D. Cal. 1985). See also Castaneda, 648 F.2d at 617 ("While employees may sue their employer for breach of a collective bargaining contract[,] . . . employees must attempt to exhaust the contractual grievance procedures before seeking judicial relief.").

Here, Senter concedes that he did not proceed to arbitration on his grievance or that arbitration is the exclusive grievance procedure to be followed.[9] Rather, he contends that the Union breached its duty of fair representation by not proceeding to arbitration on Senter's behalf. In effect, if the Court finds that the Union did not, as a matter of law, breach its duty of fair representation to Senter, then both the Union and Hughes prevail: the Union, because it did not breach its duty of fair representation; and Hughes, because Senter failed to exhaust his bargaining agreement remedies.

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9. The Southern California Agreement provides in pertinent part: "A grievance concerning a layoff or discharge must be filed in writing . . . and processed in Step Two of the Grievance Procedure . . . ." Jackson Decl., Exh. 151, at 91; and "In the event the grievance is not settled or disposed of in Step Two . . . or in informal arbitration, and the Union wishes to process it further, they may submit it to arbitration . . . ." Id., Exh. 151, at 94.

2. The Union Did Not Breach Its Duty Of Fair Representation

To prove a breach of duty of fair representation, Senter must show that the Union's decision not to pursue his grievance to arbitration was arbitrary, discriminatory, or in bad faith. Fristoe, 615 F.2d at 1214 (quoting Vaca, 386 U.S. at 190). To decide whether the Union's decision was arbitrary, the Court need not ask whether Senter's grievance was in fact legitimate -- rather, it need simply determine whether the Union's investigation of Senter's allegations was arbitrary, discriminatory, or in bad faith. Id. Indeed, "[i]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or a jury found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced." Id. (citing Vaca, 386 U.S. at 192-93).

Having examined the evidence presented by the parties, the Court cannot conclude that the Union acted arbitrarily, discriminatorily, or in bad faith. In an affidavit submitted by recording secretary John C. Owens ("Owens"), the Union representative assigned to handle Senter's grievance, Owens states that he participated in negotiations with Hughes representative Conrad Santos regarding the grievance, that the Union decided that Hughes had not violated the Southern California Agreement for the reasons described in Section I above, and that he sent Senter a letter stating the Union's position that it would not pursue his grievance to arbitration. Owens Decl., ¶¶ 3-11, at 2-4. Owens further states that "the Union's decision not to proceed on the issues raised in Senter's grievance was based solely on the Union's view of the merits of the grievances [sic]." Id., ¶ 11, at 4.

Because the Union did not handle his grievance improperly, Senter has not demonstrated a breach of the duty of fair representation. Accordingly, the Court finds that the Union prevails as a matter of law because its decision not to pursue arbitration was not arbitrary, discriminatory, or in bad faith. The Court also finds that Hughes prevails as a matter of law because Senter failed to

proceed to arbitration on his grievance.[10]

3. Senter's Conspiracy Cause Of Action Also Fails

In his first amended complaint, Senter alleges that "Hughes and the Union . . . consented, agreed, and conspired with one another to deprive and deny Plaintiff the rights, privileges, and benefits which accrued to him under the collective bargaining agreement at issue in this lawsuit." Notice of Removal, Exh. 2, at 10.

Notwithstanding that Senter cannot bring forth a valid cause of action against Hughes under the Southern California Agreement because of his failure to first proceed to arbitration, Senter cannot prevail on his conspiracy claim. As discussed in Section I above, both Hughes and the Union have presented ample evidence that Senter's bargaining rights were not violated, and therefore, the Union and Hughes did not conspire to violate any such rights. Moreover, Senter has presented no credible evidence to raise a genuine issue of material fact regarding the same.

Accordingly, the Court finds that both Hughes and the Union prevail on this issue.

III. Conclusion

In sum, because no genuine issues of material fact exist, the Court **GRANTS** Hughes' and the Union's motions for summary judgment.

IT IS SO ORDERED.

DATED: December 15, 1993

DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

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10. Even assuming that Senter's action against Hughes for violation of the Southern California Agreement is properly before this Court, Senter does not prevail on the merits because he cannot show that he had a contractual right under either the Southern California or Carlsbad Agreements to perform the timekeeping function at Carlsbad.

APPENDIX "D"
(Denied) PETITION FOR REHEARING
TO US COURT OF APPEALS, 9TH CIRCUIT
NO. 94-55359
FILED, May 5, 1995

UNITED STATES COURT OF APPEAL
NINTH CIRCUIT

WILLIAM T. SENTER,
Plaintiff/Appellant,

vs.
HUGHES AIRCRAFT COMPANY,
ELECTRONIC AND SPACE TECHNICIANS
LOCAL 1553, a Labor Union, and
DOES 1 THROUGH 25, INCLUSIVE,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT
Honorable DAVID V. KENYON, Judge Presiding

PETITION FOR REHEARING

ERIKA W. SENTER
ATTORNEY AT LAW
Calif. Bar No. 97872
4199 Campus Drive, Suite 700
Irvine, Calif. 92715
tel. (714) 854-5309
fax. (714) 854-4897

Attorney for Appellant
William T. Senter

TABLE OF CONTENTS
(omitted)

TABLE OF AUTHORITIES
(omitted)

TO THE CLERK OF THE COURT:
On April 20, 1995, the Court entered its Memorandum of Judgment on the appeal of WILLIAM T. SENTER ("Senter") from the district court's grant of summary judgments in favor of HUGHES AIRCRAFT COMPANY ("Hughes") and ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553 ("Union"). Senter now, respectfully, petitions the Court to rehear that appeal.

I. INTRODUCTION AND STATEMENT OF POINTS RAISED IN THE PETITION.

In the judgment of Senter's counsel, a rehearing of this appeal is warranted because highly material points of fact were overlooked in reaching the decision. Though the Court, in its Memorandum of April 20, 1995, has accurately expressed the relevant law, the conclusion the Court reached was faulty. To wit:

Senter claimed that, as the bargaining unit timekeeper for Hughes' Microelectronic Systems Division ("MSD") in Rancho Santa Margarita, he had a contractual right to have his job moved to Carlsbad when the division relocated there. The Court stated: "In order to determine whether the Union's decision [not to pursue Senter's claim to final arbitration] qualifies as a good faith discretionary decision we first evaluate the strength of Senter's grievance against Hughes. *Peters v. Burlington N.R.R.*, 931 F.2d 534, 541 (9th Cir. 1991)." [Page 2 of Memorandum.] In accordance with that directive, the Court then examined Senter's claim and found that:

(a). "The Southern California Agreement does *not* vest rights in employees by virtue of the particular division they work for, but rather by virtue of their being employed at a particular Hughes plant, . . . [because Senter's] bargaining unit is defined by the *plants* it covers, and not by employment in particular Hughes' product lines or divisions." [Memorandum, page 3]

and,

(b). "Senter has presented no evidence indicating that he had any . . . contractual rights to that job at the Carlsbad plant." [Memorandum, page 4.]

On these findings the Court concluded that: "In view of the weakness of Senter's claims, the Union's decision not to pursue Senter's claim to final arbitration due to its lack of merit was a legitimate exercise of discretionary judgment." [Memorandum, page 4].

Senter respectfully submits that this conclusion is erroneous for it is based on findings that are faulty because they overlook the following material facts:

1. Because in the context of the CBA both words were understood to connote the business entity, the difference between "plant" and "division" was *not* a disputed issue between the parties and, therefore, was not discussed in the appeal.

The term "plant" or "plants" as used in the Southern California Bargaining Agreement, and as understood by the parties, is a term of art which is used interchangeably with the word "division" to connote not the physical facility or geographic site of the particular Hughes' establishment in question, but to connote the business enterprise that Hughes conducts at the location involved. Listing the included employment that defines the bargaining unit by location of the plant that houses the business, rather than by the business name of the plant, is merely a shorthand convenience for easy reference. It is undisputed that the CBA, expressly and by established custom, sets job rights (i.e. job definitions, seniority rights, grievance procedures, etc.) according to the business division or group involved and not by where the employment takes place. All parties always understood that the relevant thing was the business division involved and not the location of the business division.

2. The Court has overlooked the implication and significance of the "successorship" clause contained in the Southern California Agreement which binds "any successor or assignee of all or part of the employer" to the agreement.

Senter's grievance makes express reference to the

successorship clause (Article II, section E-1). [CR 17, Exh."C"; AtEOR 30[1]]. The matter was addressed in the Opening Brief at page, 9:14-16. However, since the parties admitted that the Southern California Agreement was applied and operative in Carlsbad (or, at least, in the MSD portion of the Carlsbad plant) after the move, the successorship obligation became essentially a "non-issue." But, if the Court's reading that the Southern California Agreement is correct and employment rights vest by plant, then the successorship provision would operate to bind the "successor" plant to the agreement. It is an undisputed fact that, as a result of the move, the work formerly performed at the plant in Rancho Santa Margarita was assigned to the plant in Carlsbad. Certainly therefore, the Carlsbad plant, or at least the MSD portion of that plant, became the "successor" to the Rancho Santa Margarita plant, and is by reason of that status, bound to honor the Southern California Agreement with respect to vested rights of all employees of MSD, including Senter.

3. In rejecting Senter's claim of a contractual right to have his job of unionized timekeeper for the MSD work force continued after the move to Carlsbad, the Court overlooks, as well, "Supplemental Agreement # 11"

Senter's grievance, also, explicitly refers to Supplemental Agreement # 11.[CR 17, Exh. "C"; AtEOR 34]. It is discussed in the Opening Brief at page 9. By that provision, Hughes promises the Union membership, including Senter, that their job rights under the Southern California Agreement would be continued in the new location in the event of a move "to any facility established in the San Diego area." Senter had a contractual right to expect that Hughes would honor that promise and would extend to him, in the new location, the seniority and the other vested employment rights that he enjoyed at Rancho Santa Margarita. Since, at the time of the move, Senter held senior rights to his job (no other unionized timekeeper

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1. Senter continues herein the convention followed, in the parties' previous briefs, that "AtEOR" refers to Appellant's Excerpts of Record, and "AeEOR" refers to Hughes' Appellee Excerpts of Record.

had a right to replace him[2]), Senter had the contractual expectation that the seniority right to the job that he held at Rancho Santa Margarita would be moved to Carlsbad.

4. With respect to the fact that "Hughes and the Union presented evidence that timekeeping at Carlsbad was not unionized" [Memorandum, page, 4], the Court overlooked that this fact is entirely *immaterial* to Senter's right to be the unionized timekeeper for the MSD portion of the Carlsbad plant.

This is so, because the Carlsbad Agreement is, by its express terms, a contract that is limited to the employees of the "Industrial Products Division ("IPD") and Hughes Technology Center ("HTC") of the Hughes Aircraft Company." The very definition of "Employer" contained in the Carlsbad Agreement so limits the Agreement. [CR 17, Exh. "B"; AeEOR 65; also, Hughes' Brief at 7:8-14]. By operation of law therefore, the provisions of the Carlsbad Agreement, or the lack thereof, cannot, and do not, impact on the job rights of union members who are not employed by either IPD or by HTC. The mere relocation of MSD to Carlsbad, to share that plant site with IPD workers, did not recast MSD employees into IPD employees. Thus, the provisions of the Carlsbad Agreement do not apply and are immaterial to the job rights of MSD workers, including Senter.

5. Finally, in agreeing that Senter's grievance lacked merit in spite of the fact that "Senter's unionized timekeeper job (was protected) at the Santa Margarita Plant" [Memorandum, page 3], the Court overlooked that Senter also grieved that he was laid off *before* his job ended at the Rancho Santa Margarita plant.

It is undenied that employees, for whose time records Senter was customarily and regularly responsible, remained employed at the Rancho Santa Margarita plant site after Senter was laid off, and that the official "relocation" of MSD to Carlsbad occurred prior to

---

2. In its reply brief to the district court, Hughes suggested that Senter's rights to the timekeeping job were junior to those of a salaried accountant at Rancho Santa Margarita who had retained bump rights as a Timekeeper A. The issue is a "red herring" because the accountant had not exercised his bump rights and was, in fact at the time of the move, on leave from his accounting job on a long-term disability. No evidence was presented that the accountant ever sought his right to bump Senter.

Senter's layoff. [Opening Brief, 12:24-14:7 and footnote 5; Reply Brief, 13:18-20]. A significant point in Senter's grievance is his claim that the "closure" of the Rancho Santa Margarita plant and his layoff did not coincide, and that, therefore, it is evident that "closure of the plant" was a mere pretext for the layoff. Irrespective of the logic of this argument, however, under any reading of the Southern California Agreement, including this Court's, the taking away of Senter's job, while work remained at the Rancho Santa Margarita plant for which Senter had been regularly and customarily responsible, constitutes a material breach of the CBA and a violation of Senter's rights.

II. DISCUSSION

A.

THE TERM "PLANT" AS USED IN THE SOUTHERN CALIFORNIA AGREEMENT, AND AS UNDERSTOOD BY THE PARTIES, IS A TERM OF ART WHICH IS USED INTERCHANGEABLY WITH THE WORD "DIVISION" TO INDICATE THE BUSINESS ENTITY INVOLVED.

The difference between "plant" and "division" was not a disputed issue between the parties and, therefore, was not discussed in the appeal. Senter finds the Court's conclusion that, "(t)he Southern California Agreement does not vest rights in employees by virtue of the particular division they work for, but rather by virtue of their being employed at a particular Hughes plant," surprising, since this claim has never been made by defendants. The reason no such claim was made by the defendants is because they know and, the record reflects, that there is no essential difference between those terms as they are used in the CBA. In determining job rights, all parties always understood that the relevant designation was to the business operation or entity involved and not the physical location of that business entity.

For example:

In describing the procedure for "Installation of New and Revised Job Classifications," Section I of Article IV [CR 17 at pages 23-25 of Exh."C" the CBA provides:

> 1. Management may, in accordance with its operation requirements, delete, establish or revise Job

> Classifications together with Job Descriptions and raise of pay therefore. The employer agrees that it will promptly notify the Union President, by registered or certified mail of any such intent, and the Division, Divisions or Group where the Job is used or deleted.

* * *

> 6. This section shall not preclude a Group or Division from adding a new job classification per Supplemental Agreement #7 "Workforce Flexibility" that may include the combination of duties from existing job classifications into new job classifications.
>
> (Emphasis added)

Note: Senter's March 16, 1992 grievance (the first grievance) addressed the failure of Hughes to comply with Article IV, Section I for deleting, or revising, or combining his job classification. [See, Opening Brief, page 11]. If Hughes (or the Union) had legitimate concerns of "job duplication" pertaining to Senter's bargaining unit "Timekeeper A" classification at MSD, those concerns should have been aired in the hearing of the first grievance. They were not. The reason they were not is because both Hughes and the Union knew that Senter's job classification was unique, and that it had no relationship to whatever non-union timekeeping function existed in the IPD organization.

In providing for "Seniority" rights at Article XVIII of the Agreement [CR 17, Exh."C" page 64-69], the contract similarly uses the term "division." It states:

Section A. . . .

> 1. "Seniority" is defined as the length of service in a Job Classification except as otherwise provided herein. Seniority shall be applied to the job classifications in the bargaining Unit within a Group, or where applicable a Division Plant Site ... (at p. 64)

Section B. . . .

> 2. Present Job Classification seniority is measured by length of service in the presently-held Job Classification. In addition, an employee is also credited with seniority in his or her Group/Division ... (at p. 65)

Section D. . . .

> 1. An employee transferred by the Employer to another Group/Division Plant site shall continue to accumulate seniority. ... (at pp. 67-68)
>
> (Emphasis added).

Note: Senter was the only timekeeper the Rancho Santa Margarita Division had; his seniority standing was therefore not an issue in determining his right to be relocated to Carlsbad. Hughes admits that the relocated MSD employees retained, in Carlsbad, the seniority rights they had under the Southern California Agreement irrespective of any seniority rights of IPD employees. [Hughes' Brief, page 9]. Senter's vested job rights under the Southern California Agreement were entitled to receive like treatment; fair procedure and due process require it.

Likewise, in addressing "Grievance Procedure" in Article XXIV [CR 17 at pages 88-99] the CBA speaks in terms of "division" in setting out those rights. For instance:

> The step Two grievance meeting will consist of the following:
>
> For the Company: The Department Manager(or equivalent level) and a Labor Relations representative.
>
> For the Union: A Union Business Agent and the Senior Steward certified for the Division where the grievance occurred. (at page 89)
>
> (Emphasis added).

Note: It is undisputed that, at the Union's express direction to Senter, his Step Two hearing in July, 1992 (the second grievance), was processed and held in Carlsbad. Senter is informed and believes that no Senior Steward certified for MSD attended his grievance meeting, and that (in addition to all others), for that reason alone, his Step Two grievance meeting in July 1992 was an unfair procedure. [See, Opening Brief, page 14:8-19 and footnote 6].

In addition to the above quoted contract provisions, which establish clearly that the word "plant" as used in the bargaining unit definition of the Southern California Agreement connotes "division" and is intended to refer to the business entity housed at the named locations, the parties explored and resolved any ambiguities

concerning this issue in discovery.

To wit: Interrogatories #7, #8, #9, #10 and #11 directed to the Union, and Interrogatory #7 directed to Hughes, explored the parties' contentions concerning whether job rights under the Southern California Agreement vested by virtue of being employed at a particular plant, or whether they vested in the work performed at the plant. In each case the defendants answered that it was the work that was covered and not the plant where the work was performed. Both Hughes and the Union concede that the CBA which covered work at the Rancho Santa Margarita site continued to cover the work even though the work was relocated to Carlsbad. [CR 22; AeEOR 32:15 to 36:19, and AtEOR 8:25 to 9:8]

If the job rights of the relocated employees did not cease when they left Rancho Santa Margarita, it is obvious that the parties to the Southern California Agreement did not intend that the job rights vest by virtue of being performed in a particular location.

B.

THE COURT HAS OVERLOOKED THE SIGNIFICANCE OF THE "SUCCESSORSHIP" CLAUSE CONTAINED IN THE CBA.

The Southern California Agreement has an express "successorship" provision which provides at Article II, section E-1 that:

> This Agreement shall be binding on any successor or assignee of all or a major part of the Employer.

In his grievance, Senter specifically points Hughes and the Union to that provision. [AtEOR 4 and 9].

As stated, that the Southern California Agreement survived the closure of the Rancho Santa Margarita plant and operated in the Carlsbad plant after the move to protect the rights of MSD workers in Carlsbad is an admitted fact. It is, also, undisputed that, as a result of the move, the work formerly performed at the plant in Rancho Santa Margarita was assigned to the plant in Carlsbad. Thus, the Carlsbad plant, or at least the MSD portion of that plant, became the "successor" to the Rancho Santa Margarita plant.

Ostensibly, in compliance with the successorship provision of the CBA and, also, in compliance with the long established practice of "simply adding the new plant to the definition of the bargaining unit when a move occurs," Hughes and the Union did, in fact, continue the Southern California Agreement at the MSD portion of the Carlsbad plant. [See, Reply Brief, at 1:18-22; also, the Union's Interrogatory Answer No. 4; CR 22, Exh. 1; AeEOR 130:26-131:3].

Moreover, Hughes admits that it "acceded to the Union's request to keep the two bargaining units distinct" after the move and to "protect the seniority of those MSD employees relocated to Carlsbad." [Hughes' Brief, at 9:3-7].

A further indication still that the Carlsbad plant became the assignee of the Southern California Agreement, and that MSD employee rights vested in Carlsbad after the merger, is the undisputed fact that Senter's grievance was heard and processed, not in Rancho Santa Margarita (which had not yet closed at the time of Senter's grievance hearing), but in Carlsbad. Even though Senter was never employed in Carlsbad, his job rights under the Southern California Agreement were adjudicated at the Carlsbad plant. Such conduct is inconsistent with the claim that Senter had rights only at Rancho Santa Margarita. As said above, the CBA requires that grievances be heard and processed where they occur. [Opening Brief, at 14:8-12 and footnote 6].

C.
THE COURT, ALSO, OVERLOOKED "SUPPLEMENTAL AGREEMENT # 11"

Even if there were no "successorship" clause in the Southern California Agreement, Hughes is contractually bound to recognize, in Carlsbad, the job rights that were vested in Rancho Santa Margarita. In Supplemental Agreement # 11, Hughes promised the Union membership, including Senter, that their job rights under the Southern California Agreement would be continued in the new location in the event of a move "to any facility established in the San Diego area." Accordingly, Senter had a contractual right to expect that Hughes would honor that promise and would extend to him, in the new location, the seniority and the other vested employment rights that he enjoyed at the Rancho Santa Margarita site. Since, at

the time of the move, Senter held senior rights to his job (no other unionized timekeeper had a right to replace him[3]), Senter had the contractual expectation that the seniority right to the job that he held at Rancho Santa Margarita would be moved to Carlsbad.

D.

IT IS ENTIRELY IMMATERIAL TO SENTER'S JOB RIGHT THAT TIMEKEEPING AT IPD IN CARLSBAD WAS NOT UNIONIZED.

The Court concludes that Senter's job right claim is weak because "Hughes and the Union presented evidence that timekeeping at Carlsbad was not unionized." [Memorandum, page, 4]. That evidence, however, is entirely immaterial to Senter's right to be the unionized timekeeper for the MSD portion of the Carlsbad plant. By its express terms the Carlsbad Agreement does not cover the plant site in Carlsbad, but is limited to the employees of the "Industrial Products Division ("IPD") and Hughes Technology Center ("HTC") of the Hughes Aircraft Company." [CR 17, Exh. "B"; AeEOR 65; also, Hughes' Brief at 7:8-14]. At the outset, the "Employer" in the Carlsbad Contract is defined:

> THIS AGREEMENT is made and entered into at Carlsbad, California, this 4th day of March, 1989 by and between Industrial Products Division and Hughes Technology Center of the HUGHES AIRCRAFT COMPANY, a corporation, hereinafter referred to as the "Employer," and ELECTRONIC & SPACE TECHNICIANS, LOCAL 1553, AFL-CIO, hereafter referred to as the "Union." (at page 1)
>
> (Emphasis added)

Therefore, the contract in Carlsbad is not a plant-wide contract. It applies not to whoever works in the Carlsbad plant, but is limited, by

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3. In its reply brief to the district court, Hughes suggested that Senter's right to the timekeeping job were junior to those of a salaried accountant at Rancho Santa Margarita who had retained bump rights as a Timekeeper A. The issue is a "red herring" because the accountant had not exercised his bump rights and was, in fact at the time of the move, on leave from his accounting job on a long-term disability. No evidence was presented that the accountant ever sought his right to bump Senter.

definition, to the employees of the Industrial Products Division ("IPD") and the Hughes Technology Center ("HTC"). Thus, the provisions of the Carlsbad Agreement, or the lack thereof, cannot impact on the job rights of union members, like Senter, who are not employed by either IPD or by HTC. The fact that MSD moved its operations to Carlsbad, and the fact that its workers share plant site space with IPD workers, did not recast MSD employees into IPD employees. Since the Carlsbad Agreement has application only to IPD and HTC employees, its provisions are entirely immaterial to the job rights of Senter as an employee of MSD under the Southern California Agreement.

E.

UNDER ANY READING OF THE SOUTHERN CALIFORNIA AGREEMENT, TAKING SENTER'S JOB FROM HIM WHILE WORK FOR WHICH HE WAS REGULARLY RESPONSIBLE REMAINED TO BE DONE AT THE RANCHO SANTA MARGARITA PLANT, IS A MATERIAL BREACH OF THE COLLECTIVE BARGAINING AGREEMENT.

Finally, the Court overlooked the fact that Senter grieved that he was laid off before his job ended at the Rancho Santa Margarita plant. At page 3 of the Memorandum, the Court recognized that "Senter's unionized timekeeper job (was protected) at the Santa Margarita Plant." It follows, therefore, that if Senter's job at Rancho Santa Margarita has not ended when he was laid off, his termination was a breach of the contract.

Neither Hughes nor the Union deny that employees for whose time records Senter was customarily and regularly responsible remained employed at the Rancho Santa Margarita plant after Senter's layoff on July 10, 1992. [Opening Brief, 12:24-14:7 and footnote 5; Reply Brief, 13:18-20]. Under any reading of the Southern California Agreement, including this Court's, taking Senter's job from him while work he was regularly responsible for remained to be done at the Rancho Santa Margarita plant, is a material breach of the CBA.

Moreover, a significant point in Senter's grievance is his claim that the "closure" of the Rancho Santa Margarita plant and Senter's

layoff did not coincide, and that, therefore, "closure of the plant" was a mere pretext for the layoff. Hughes admits that the official "relocation" of MSD to Carlsbad occurred prior to Senter's layoff. In its response to Senter's Interrogatories Hughes avers [CR 22; AeEOR 165 to 185]:

> RESPONSE TO INTERROGATORY NO.5:
> Specifically, the last full day of work in Rancho Santa Margarita for Microelectronic Systems Division was July 3, 1992. After the July 4th holiday, those employees who had been offered jobs in Carlsbad reported to work in Carlsbad. The Rancho Santa Margarita facility did not "close" because there were other divisions of Hughes operating out of that facility after the MSD product lines were no longer located there. (at AeEOR 172).

And, in response to a question concerning the timekeeping duties that Senter had been responsible for which remained at Rancho Santa Margarita after Senter's layoff:

> RESPONSE TO INTERROGATORY NO. 26:
> Hughes maintains that it did not breach any provision of the applicable CBA when the timekeeping duties for hourly workers who continued to work at the Rancho Santa margarita facility were not performed by Plaintiff. Although the employees were physically located in Rancho Santa Margarita after July 10, 1992, their time cards were being processed at Carlsbad. Accordingly, because Hughes and EAST agreed that there would be no bargaining unit timekeeper in Carlsbad, the timekeeping duties for those workers physically located in Rancho Santa Margarita was not covered by the collective bargaining agreement in effect after July 10, 1992.

Note: Hughes admits that the plant in Rancho Santa Margarita did not "close" after all, but that those who worked there were, nevertheless, no longer covered by the Southern California Agreement because MSD had moved to Carlsbad. This concedes that

Hughes regards workers' rights vested by the "division" that is housed in a plant and not by plant site. Note further, however: Hughes (and the Union) have admitted that the collective bargaining agreement in effect after July 3, 1993, at Carlsbad, for MSD workers, is the Southern California Agreement, which by definition of the bargaining unit must have its timekeeper be a bargaining unit member.

Senter was the only bargaining unit timekeeper that Hughes had for the Microelectronic System Division. If timekeeping duties for those employed by MSD continued to need to be performed, Senter had the contractual right to perform those duties. To lay Senter off on July 10, 1992, was a clear breach of the Southern California Agreement.

III. CONCLUSION.

For all the reasons herein stated Appellant, WILLIAM T. SENTER, respectfully requests that the Court grant him a rehearing of his appeal, and that the summary judgments entered against him in the district court on January 27, 1994 be ordered REVERSED.

DATED: May 3, 1995

Respectfully submitted,

ERIKA W. SENTER
Attorney for Appellant
4199 Campus Drive
Suite 700
Irvine, California 92715

[PROOF OF SERVICE - omitted]

APPENDIX "E"

EXTENSION OF TIME TO FILE WRIT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

August 25, 1995

Ms. Erika Senter
4199 Campus Drive
Suite 700
Irvine, CA 92715

Re: William T. Senter
v. Hughes Aircraft Company, et al.
Application No. A-183

Dear Ms. Senter:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on August 25, 1995, extended the time to and including October 5, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK
By Sandra Elliott Spagnolo
Assistant Clerk

[Notification List-omitted]

Supreme Court, U.S.
FILED
JAN 10 1996
CLERK

No. 95-898

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. SENTER,
Petitioner,
vs.
HUGHES AIRCRAFT COMPANY, and
ELECTRONIC AND SPACE TECHNICIANS,
Local 1553, A Labor Union,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICIA L. KASSCHAU
Counsel of Record
T. WARREN JACKSON
Of Counsel
HUGHES ELECTRONICS CORPORATION
P.O. Box 80028
Building CO1, M/S A112
Los Angeles, California 90080-0028
(310) 568-7243
Attorneys for Respondent
HUGHES AIRCRAFT COMPANY

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QUESTIONS PRESENTED

A. Did the Court of Appeals properly sustain the District Court's grant of summary judgment in favor of both the Respondents upon a basis fairly presented by the record?

B. Does the Petition present any novel important question of federal labor law which has not been, but should be decided by this Court regarding a union's exercise of its duty of fair representation under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

List of Hughes Aircraft Company's Parent Company and Subsidiaries

Parent Company:

Hughes Electronics Corporation

(Nonwholly owned) Subsidiaries of Hughes Electronics Corporation:

None

(Nonwholly owned) Subsidiaries of Hughes Aircraft Company:

ACCSCO S.A.

ELEKLUFT Elektronik—und Luftfahrtgerate GmbH

Empresa Nacional de Optica S.A.

Guiado y Control S.A.

International Electro-Optical Industry Anonim Sirketi

The Gulf Industrial Technology Company (KSC)

Translant, Inc.

UKADGE Systems Limited

FLIR Systems, Inc.

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No. 95-898

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

WILLIAM T. SENTER,
Petitioner,
vs.
HUGHES AIRCRAFT COMPANY, and
ELECTRONIC AND SPACE TECHNICIANS,
Local 1553, A Labor Union,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Hughes Aircraft Company (hereinafter referred to as "Hughes") respectfully submits the following Brief in Opposition to the Petition for Writ of Certiorari ("Petition" or "Pet.") filed by William T. Senter (hereinafter referred to as "Petitioner").

OPINIONS AND JUDGMENTS BELOW — Supplemented List

The Judgment in favor of Respondent Hughes, signed and filed January 14, 1994, entered January 27, 1994 (*infra*, Opposition Appendix pages A1-A9 [unreported];

Judgment in favor of Respondent Electronic and Space Technicians, Local 1553, AFL-CIO (hereinafter referred to as "EAST" or "Union"), signed and filed January 14, 1994, entered January 27, 1994 (*infra*, Opposition Appendix pages B1-B2 [unreported] (hereinafter referred to as "Opp. App.").

JURISDICTION

Hughes contends that the instant Petition was not timely filed in accordance with the Rules of the United States Supreme Court, including *inter alia* Rules 5, 9, 13, 22 and 30.

STATUTORY AND REGULATORY PROVISIONS

This case arises under Section 301 of the Labor Management Relations Act, 1947 ("LMRA"), 61 Stat. 156, 29 U.S.C. § 185(a) (West Supp. 1995), which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined by this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 411(a)(4) from the "Bill of Rights of Members of Labor Organizations" in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, *et seq.* ("LMRDA") (West Supp. 1995), excerpted in the

Petition (3, 20), provides in its entirety:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof; *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

United States Supreme Court Rule 9.1 provides:

> An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal

Justice Act of 1964, see 18 U.S.C. §3006A(d)(6), or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified.

STATEMENT OF THE CASE

Following layoff from his position as timekeeper at Hughes, Petitioner filed a grievance under the Southern California collective bargaining agreement[1] that governed the terms and conditions of his employment, seeking transfer to another Hughes facility located in Carlsbad, California, in lieu of layoff. The facility to which he sought transfer operated under a separate and distinct collective bargaining agreement[2] under which Petitioner had no contractual rights. Furthermore, timekeeper was not a bargaining unit position under the Carlsbad Agreement.

Petitioner filed a layoff grievance as soon as he was notified of his impending layoff, which was rejected as premature by the Company with the concurrence of the Union. Following his layoff, he filed a second

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[1] Agreement between Hughes and EAST, effective November 2, 1991 to November 5, 1994 ("Southern California Agreement").

[2] Agreement between Hughes' Industrial Products Division and Hughes Technology Center and EAST, effective March 4, 1989 through June 27, 1992 ("Carlsbad Agreement").

grievance. The Union processed his second layoff grievance through the third step (informal arbitration) of the four-stage mandatory grievance and arbitration procedure set out in the Southern California Agreement. On September 23, 1992, after additional informal resolution efforts with the Company failed, the Union informed Petitioner that it would not proceed to formal final and binding arbitration — the last step of the mandatory grievance and arbitration procedure — based upon its determination that his grievance lacked sufficient merit — *i.e.*, that he lacked contractual rights under the Southern California Agreement to either the facility or the position to which he sought transfer.

On March 17, 1993, Petitioner filed a state court action against Hughes and the Union for breach of an employment contract and unfair labor practices.[3] Petitioner concedes the action was properly removed by the Union and the Company under Section 301 of the LMRA (Pet. 10). On January 27, 1994, the District Court entered summary judgment in favor of the Union and Hughes and against Petitioner on his complaint (Opp. App. A1-A9 and B1-B2). The District Court held that Petitioner's complaint for breach of the collective bargaining agreement against Hughes failed because (1) as a matter of law, he had not satisfied the jurisdictional prerequisites to file suit against Hughes — to wit, he had not exhausted the collective bargaining agreement's mandatory grievance procedure and he had failed to

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[3] The questions presented in the Petition do not encompass the unfair labor practice claims. Petitioner thus does not challenge the Court of Appeals ruling that the District Court properly exercised discretionary supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over his claims under California Labor Code §§ 923 and 1122 and properly determined that those state law claims are preempted by federal labor law, specifically, Section 8 the National Labor Relations Act, 29 U.S.C. § 158.

demonstrate that the Union breached its duty of fair representation by declining to process his grievance through formal arbitration; and (2) he lacked any rights under his collective bargaining agreement (the Southern California Agreement) to either the facility or the position to which he sought a transfer. The District Court denied Petitioner's Motion for Reconsideration on March 30, 1994.

Petitioner appealed to the Ninth Circuit Court of Appeals, which on April 20, 1995, affirmed the District Court's grant of summary judgment in favor of both Hughes and the Union on the grounds that "Petitioner has failed to present sufficient evidence raising a genuine issue of material fact that the Union breached its duty of fair representation" in handling his grievance (Pet. App. 4). The Court of Appeals approved the District Court's finding that Petitioner lacked contractual rights to the position to which he sought transfer in lieu of layoff (*ibid.*).[4] On June 7, 1995, the Court of Appeals denied a petition for rehearing (Pet. App. 7).

In the instant Petition for a Writ of Certiorari, Petitioner seeks this Court's review on two principal grounds. First, he seeks review under Rule 10.1(a) on the ground that the Court of Appeals affirmed the District Court decision on a point neither raised, briefed nor argued by the parties, and therefore, so departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's plenary power of supervision. Second, pursuant to Rule 10.1(c), he contends that the case presents a ripe and important federal labor law question regarding the parameters of the Union's duty of fair representation, although nothing in

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[4] The Court of Appeals also ruled that the District Court had not abused its discretion in denying Petitioner's Motion for Reconsideration (Pet. App. 6).

its recent Section 301 decisions suggests that such an issue might appeal to this Court. Petitioner nonetheless invites the Court to retreat from the guiding principles of federal labor law enunciated in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), and its progeny, concerning the requirement that an employee grievant exhaust his contractual remedies or allege a breach of a union's duty of fair representation as a jurisdictional prerequisite to filing suit against an employer for breach of a collective bargaining agreement.

As demonstrated below, the Court of Appeals for the Ninth Circuit fully considered and correctly decided the issues. In any event, the Petition does not present any important question of federal law upon which there are conflicting decisions by the Courts of Appeals, or which otherwise should be decided by this Court. Indeed, this Petition is nothing more than a thinly-veiled attempt to have this Court sit as the ultimate fact finder and evaluate the merits of Petitioner's grievance for the *sixth* time. Accordingly, this Court should dismiss the instant Petition and let the lower courts' well-reasoned judgments stand.

CORRECTIONS TO PETITIONER'S STATEMENT OF THE CASE

Successor or Assignee: Article II, Section E, Successor or Assignee, paragraph 1 of the Southern California Agreement provides: "This Agreement shall be binding on any successor or assignee of all or a major part of the Employer." (Opp. App. C3). This provision of the Southern California Agreement applies, if at all, only when an entity other than Hughes assumes control. Contrary to Petitioner's unsupported assertion (Pet. 7), one of Hughes' own facilities or divisions does not constitute such a successor or assignee to another

Hughes' facility or division. No successor issue is raised by a transfer of work within Hughes because no other entity is assuming control from Hughes.

Supplemental Agreement # 11: Petitioner omits the short but pertinent introductory paragraph of Supplemental Agreement # 11, which is appended to the Southern California Agreement (Pet. 5). The omitted paragraph states, "Pursuant to our discussion during contract negotiations, this will confirm our understanding concerning facilities which may be opened in the San Diego area." (Opp. App. D2). In this case, the work from the closed facility was transferred to an existing, not a new facility, and both facilities already were represented by the Union. The omitted paragraph establishes that Supplemental Agreement # 11 has no application here.

Agreement to Negotiate Integration of Two CBAs: Following adoption of the Carlsbad Agreement "en toto" as an Addendum to the Southern California Agreement in 1992 (Pet. 6), the Company and the Union agreed to negotiate over eliminating all language differences between the two CBAs and integrating them into a single agreement. It was envisioned that this would be a continuing process that would last several years (Opp. App. E2).

Submission Without Oral Argument: Petitioner insinuates that he was prejudiced by the Ninth Circuit deciding his case without oral argument (Pet. 14). However, Petitioner declined oral argument and moved to submit this case for decision on the written record. See Order of the United States Court of Appeals for the Ninth Circuit, Case No. CA: 94-55359, DC: CV-93-02252-Kn (Central Division), filed April 3, 1995 (Opp. App. F1).

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The instant Petition should be denied because, as a threshold matter, it was not timely filed by his counsel of record and, in any event, because it presents no important question of federal law requiring this Court's attention. Petitioner simply cannot accept the determination by his Union and each of the reviewing lower courts that he had no right to transfer to either the facility or position that he sought and that, in accordance with long-settled federal labor law jurisprudence, he has failed to demonstrate any breach of the Union's duty of fair representation nor any breach of the collective bargaining agreement by Hughes. As discussed below, his Petition merely seeks to have this Court to sit as the ultimate arbiter and review the facts of his case for the *sixth* time in the hopes of securing a different outcome!

Petitioner fails to appreciate that this Court does not assume the role of ultimate fact finder. Rather, a review on writ of certiorari is a matter of judicial discretion and focuses upon significant questions of *law*, not fact. Accordingly, a petition for a writ of certiorari is granted only when special and compelling reasons exist for this Court's review. See Rule of Court 10.1.[5] This Petition should be denied because the Ninth Circuit Court of Appeals' decision is grounded upon the evidence in the record and comports with long-settled precedents enunciated by this Court across the last half century

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[5] According to the ABA Journal ("Supreme Court Report," by David Savage, December 1995, at page 40), the United States Supreme Court today accepts less than one percent of all petitions filed.

concerning the Union's duty of fair representation and employee-grievants' exhaustion of contractual remedies.

A. The Petition Was Not Timely Filed.

Pursuant to Rule 13 of the United States Supreme Court, a petition for a writ of certiorari must be timely filed before this Court has jurisdiction to entertain the Petition. Hughes respectfully contends that the instant Petition was not timely filed because Petitioner's counsel of record was not admitted to the Bar of this Court when she filed the Petition at the statutory deadline, and therefore, the filing was a null act.

Rule 9.1 of the United States Supreme Court provides in relevant part that, "An attorney seeking to file a document in this Court in a representative capacity must *first* be admitted to practice before this Court as provided in Rule 5, ..." [Emphasis supplied.] Accordingly, any attorney intending to practice before this Court *first* must seek and gain admission to its Bar before filing any papers. Rule 5 sets out the specific requirements for admission to the Bar of this Court. It is a process which can be accomplished in a few weeks, but which must be concluded before an attorney as counsel of record can file any document with this Court.

In the instant case, the United States Court of Appeals for the Ninth Circuit entered its Memorandum of Judgment on April 20, 1995, affirming the District Court's grant of summary judgment in favor of Hughes and EAST (Pet. App. 1-6). Petitioner sought a rehearing on May 5, 1995 (Pet. App. 18-31), which the Ninth Circuit Court of Appeals denied by Order filed on June 7, 1995. Pursuant to Rule 13.4, Petitioner had ninety (90) days from that date, or until September 5, 1995, in which to timely file his Petition for a Writ of Certiorari. On

August 25, 1995, pursuant to Rules 13.6 and 22 of this Court, Petitioner applied for and received an extension of time to and including October 5, 1995, in which to file timely his Petition for a Writ of Certiorari with this Court (Pet. App. 32).

Petitioner attempted to file his Petition in this Court on or about October 5, 1995. However, as of that date, Petitioner's counsel of record, Erika W. Senter, was not admitted to the Bar of this Court. Accordingly, the Petition could not be docketed when the Court physically received it. Hughes is informed and believes that Ms. Senter subsequently applied and was admitted to the Bar of this Court on or about December 11, 1995, at which time the Petition was placed on the docket.

Hughes respectfully contends that the putative "filing" of the Petition with this Court on or about October 5, 1995, was a legally null act which did not satisfy the requirements for a timely filing pursuant to the Rules of this Court. Hughes contends that this conclusion is compelled by three considerations: (1) the plain language of Rule 9 of this Court's Rules: (2) the Court's refusal to docket the Petition until such time as counsel of record for Petitioner had been admitted to the Bar of this Court; and (3) practical and policy considerations. To wit, the Rules provide ample notice and time to counsel of record that admission to the Supreme Court Bar is required *prior* to filing any document with the Court. Further, the Rules provide ninety (90) days to prepare and file a petition for writ of certiorari, which provides ample time for counsel of record to seek and gain admission to the Bar and still timely file a petition for a writ of certiorari within the statutory deadline. Moreover, in this case, Petitioner's counsel of record sought an additional extension of thirty days from the Court in which to file his Petition. Petitioner's counsel of record thus had four months in which to gain

admission to the Bar of this Court and still file a timely Petition. Petitioner's counsel of record simply failed to comply with the Rules of this Court and timely file this Petition, and Hughes respectfully submits that this Court should decline to entertain it.

B. The Ninth Circuit Court Of Appeals Properly Decided This Case Based Upon Evidence Fairly Presented In The Record And Upon Grounds Expressly Asserted By The Respondents.

Petitioner first asks this Court to entertain this Petition pursuant to Rule 10.1(a) because he contends that the Ninth Circuit Court of Appeals decided the appeal on a point "not raised, not briefed, and not argued" (Pet. 13), and accordingly, "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." As demonstrated below, the Ninth Circuit affirmed summary judgment in favor of Hughes and EAST based upon evidence that was not only present in the record but also briefed and argued.

A United States Court of Appeals reviews the grant of a summary judgment motion *de novo*, examining the record before the court below in the light most favorable to the nonmoving party. *See, e.g., Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). *De novo* means that the court should make an independent determination of the issues. *United States v. First City Nat. Bank of Houston*, 386 U.S. 361, 368, 87 S.Ct. 1088, 1093, __ L.Ed.2d __ (1967). The Court of Appeals must determine whether there are any genuine issues of material fact and whether the District Court properly determined that the moving parties were entitled to judgment as a matter of law.

Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265, 273 (1986) (moving party entitled to a judgment as a matter of law where the nonmoving party has failed to make a sufficient showing on an essential element of his case as to which he has the burden of proof).

Petitioner does not dispute that the Ninth Circuit Court of Appeals outlined the proper legal analysis to determine whether Hughes breached the Southern California Agreement that governed his employment when it laid him off in lieu of transferring him to another facility. To wit, he concedes that to prevail against Hughes, he must first demonstrate that the Union breached its duty of fair representation by failing to process his grievance against Hughes to final and binding arbitration. He further concedes that a determination by the District Court that the Union made a good faith judgment not to pursue his grievance to final arbitration as a matter of law precludes any finding of a breach of the duty of fair representation and, concomitantly, precludes entry of judgment against Hughes for breach of the Southern California Agreement. Finally, Petitioner concurs that the Ninth Circuit was required to evaluate the strength of his grievance against Hughes in order to determine whether the Union made a good faith decision not to pursue his claim to arbitration. (See Pet. 10, 18; Pet. App. 2, 19.)

Petitioner disagrees only with the outcome of the Ninth Circuit's analysis (Pet. 11; Pet. App. 19). After reviewing *de novo* the language of the Southern California Agreement, the Ninth Circuit determined that Petitioner had no contractual rights to the position that he sought at the Carlsbad facility because it was not encompassed within the bargaining unit defined in the Agreement (Pet. App. 3-4). Reviewing the record in its

entirety, the Ninth Circuit further was satisfied that "the Union and Hughes had presented [unrebutted] evidence that the timekeeping position at Carlsbad was not unionized, and that even if timekeeping had been unionized, Senter would have had no rights to that position." (Pet. App. 4). Accordingly, the Ninth Circuit ratified the Union's decision not to pursue Petitioner's grievance to arbitration based upon its lack of merit and affirmed summary judgment in favor of the Union and Hughes. As demonstrated here, the Ninth Circuit properly set forth the pertinent law under section 301 of the LMRA and properly applied that law to the facts.

Petitioner lamely contends that the Ninth Circuit misinterpreted the language in the Southern California Agreement (Pet. 11, 15-16). His contention fails for several reasons. The Ninth Circuit certainly is fully capable of reading the plain language of the Agreement and ascertaining that the "Carlsbad" facility is not included in Petitioner's bargaining unit, and hence not a facility where he has any exercisable contract rights (Pet. App. 1-4, 6-7, 18-20, 23-26). Similarly, the Ninth Circuit is capable of reading Supplemental Agreement # 11 (Opp. App. D2), appended to and set forth *in its entirety* in the Southern California Agreement presented in the record, and ascertaining that it has no bearing on this case because Carlsbad is not a (1) new and (2) non-union location (Pet. App. 7, 21-22, 27-28). Likewise, the Ninth Circuit competently could determine from reading the collective bargaining agreements in the record that Carlsbad did not constitute a "successor" or "assignee" under their provisions or applicable federal labor law (Pet. App. 7, 20-21, 26-27).

Even more importantly, however, *assuming arguendo* that the Ninth Circuit had erred in its conclusions, either basing its ruling upon erroneous findings of fact or misapplying a properly stated rule of law (see Pet.

15-16), none of those grounds present a compelling reason to grant this or any petition for a writ of certiorari. The Ninth Circuit's decision, even if wrongly decided, has a very circumscribed effect, indeed, limited to Petitioner alone. No legal issues of broad import are involved here. Moreover, as noted above, there is no evidence whatsoever that the Ninth Circuit departed in any way from the accepted and usual course of judicial proceedings, and thus there is no warrant to grant this Petition under Rule 10.1(a).

C. No Important Legal Questions Of Federal Labor Law Are Presented By This Petition.

Petitioner lastly suggests that this Court should grant his Petition under Rule 10.1(c) in order to redefine the scope of the Union's duty of fair representation and the concomitant restrictions upon employee-grievants' access to the courts to enforce putative rights under collective bargaining agreements. He complains that requiring employee-grievants to exhaust binding grievance and arbitration remedies under their collective bargaining agreement prior to suing their employer for breach of the agreement effectively precludes rejected grievants from court because unions have broad discretion to decide which grievances to pursue to arbitration (Pet. 18-20). Petitioner contends that federal labor law by affording unions such broad latitude as the employees' exclusive representatives violates the employee's constitutional right of equal protection under the law and contravenes the LMRDA's "Bill of Rights of Member of Labor Organizations," 29 U.S.C. § 411(a)(4) (*id.*).

Before turning to the merits of his argument, two threshold issues warrant mention. First, Petitioner

asserts putative rights under LMRDA for the very first time in this Petition. *See Reed v. United Transportation Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) (contrasting claims brought under LMRDA and section 301 of the LMRA). Even were he able to state any such claim upon the facts he has alleged,[6] he obviously is precluded from articulating it at this late hour. *Youkaim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976) (only under extraordinary circumstances will the Court review a question that was neither pressed nor passed upon below).

Second, Petitioner deliberately omitted the germane reference to exhaustion of internal remedies from his recitation of Section 411(a)(4) in the LMRDA's "Bill of Rights of Members of Labor Organizations" (compare Pet. 3 with Opp. 3). Before seeking judicial redress under the LMRDA, Petitioner is required to exhaust his internal remedies, or demonstrate the futility of so doing, in the same manner as with a Section 301 claim. *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 88 S.Ct. 1717, 1722-24, __ L.Ed.2d __ (1968). Federal courts have enunciated the same policy of judicial noninterference in internal union affairs under the LMRDA as under the LMRA in order to foster union self-regulation.

Petitioner obviously fails to appreciate the roots of federal labor policy and the pivotal role of the unions' duty of fair representation in the scheme initiated by Congress. More than one-half century ago, the federal government sanctioned the *private* dispute settlement

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[6] Petitioner has not alleged union wrongdoing typically redressed under the LMRDA, to wit, expulsion, retaliation for participation in union activities, freedom of speech or assembly issues, dues issues, nor other issues of discriminatory representation. His claim(s) focus instead on the Union's handling of his grievances, which properly is redressed under Section 301 of the LMRA.

arrangements encompassed in collective bargaining agreements as the means of promoting workplace harmony and providing quick and informal settlements of workplace disputes that threatened to disrupt interstate commerce. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571, 96 S.Ct. 1048, 1059, 47 L.Ed.2d 231 (1976). This Court first recognized the duty of fair representation in particular more than fifty years ago in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), holding that when Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, thereby subordinating the rights and interests of the individuals to the interest of the unit as a whole, it imposed upon the unions a correlative duty "inseparable from the power of representation" to exercise that authority fairly. *Id.* at 202-04, 65 S.Ct. 233; *accord United Steelworkers of America v. Rawson*, 495 U.S. 369, 373, 110 S.Ct. 1904, 1911, __ L.Ed.2d __ (1990) ("The duty of fair representation is thus a matter of status, not contract."). This Court explicitly has recognized that the fair representation doctrine is the "bulwark to prevent arbitrary union conduct against individuals stripped of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

This Court long has held that unions must have wide discretion to act in what they perceive their members' best interests. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338, 73 S.Ct. 681, 685-86, 97 L.Ed.2d 1048 (1953). Clearly in the context of a plant closure and/or a merger of operations, such as precipitated Petitioner's layoff, a union will be confronted with diverse membership interests which likely cannot be reconciled. The union is guided by its duty of fair representation in attempting to reconcile and promote as many interests as possible. *Cf. Rosario v. Amalgamated Ladies' Garment*

Cutters' Union, Local 10, 605 F.2d 1228, 1242 (2d. Cir. 1979), *cert. denied*, 446 U.S. 919, 100 S.Ct. 1853, 64 L.Ed.2d 273 (1980). In this case, the Union won significant concessions to protect the job and wage classifications of the transferring workers and to upgrade the Carlsbad employees, but they could not prevail on the Company to transfer certain bargaining unit members in support job classifications, including Petitioner as the timekeeper, because of the Company's goal to reduce costs and overhead in the merger of the product lines (Pet. 6-7).

Deferring to the broad discretion of unions in representing their members' diverse interests, this Court held nearly thirty years ago that unions need not arbitrate every grievance. *Vaca v. Sipes*, 386 U.S. at 191-92, 87 S.Ct. at 917-18. Rather, a union owes a duty to serve the interests of all of its members without hostility or discrimination toward any and to exercise its discretion with in good faith and honestly, and to avoid arbitrary conduct. Accordingly, a union may not ignore a meritorious grievance or perfunctorily process it. *Id.* However, where, as here, a union has processed a grievance up to the last step and explored alternative informal resolutions, the reviewing courts properly find that as a matter of law the union has satisfied its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 571, 96 S.Ct. at 1059-60. Contrary to Petitioner's contention (Pet. 20), this Court has held that one reason that unions need not process every grievance is the high cost of arbitration. *Schneider Moving & Storage v. Robbins*, 466 U.S. 373, 104 S.Ct. 1844, 1851, n.19, 80 L.Ed.2d 366 (1984), *citing Vaca v. Sipes*, 386 U.S. at 191, 87 S.Ct. at 917 (union may exercise its discretion in good faith to settle grievances "prior to the most costly and time-consuming step in the grievance procedures."). As this Court has recognized, weakening

a union's financial stability might, in turn, impair their ability to function effectively as collective bargaining agents. *See Int'l Brotherwood Elec. Wkrs v. Foust*, 442 U.S. 42, 50-51, 99 S.Ct. 2121, 2126-27, 60 L.Ed.2d 698 (1979).

Just as requiring every grievant to have his day before an arbitrator arguably undermines the purpose of federal labor policy and the union's capacity to work in the best interests of the bargaining unit as a whole, so too would allowing employee-grievants to circumvent collectively bargained dispute resolution procedures. The instant Petition nowhere hints how this Court should redress these abiding federal labor policy concerns without reliance on the doctrine of fair representation and the scheme of exhaustion of contractual remedies which have evolved across the past half century.

Indeed, Petitioner is swimming upstream. Far from cutting back on the union's authority, this Court in recent years has exalted the doctrine of fair representation as an integral element of federal labor policy in affirming decisions of lower courts that have minimized the intrusions on the Union's authority. *See United Steelworkers of America v. Rawson*, 495 U.S. at 372-73, 110 S.Ct. at 1911, __ L.Ed.2d __ (1990) (endorsing view that mere negligence on the part of the union in enforcing a collective bargaining agreement does not arise to a breach of the duty of fair representation); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567, 110 S.Ct. 1339, 1346, 108 L.Ed.2d 519 (1990) ("the union typically has broad discretion in its decision whether and how to pursue an employee's grievance").

The old adage comes to mind, "If it ain't broke, don't fix it!" Contrary to Petitioner's appeal, this case exemplifies how well federal labor law policy has evolved over the last half century to promote the goal of

affording unions broad discretion in representing the diverse interests of its memberships. Petitioner's grievance arose out of the closure of the facility where he was employed. Hughes and the Union bargained over the effects of the closure and agreed to negotiate the eventual merger of the bargaining units under a single collective bargaining agreement by 1994 (Pet. 6-7; Opp. App. E1-E3). The Union sought many things from Hughes while bargaining over the effects of the closure of Petitioner's facility, and Hughes sought a number of concessions from the Union. In the end, there were compromises on both sides. The Union gained seniority and grandfathered wage protections for those workers transferring to Carlsbad, but did not prevail on transferring Petitioner and other support personnel with the product line (Opp. App. A4). When Petitioner filed a grievance, the Union processed it vigorously through three steps and then, after failing to effect an informal extra-contractual settlement, concluded that the grievance lacked sufficient merit to take to arbitration. If this employee-grievant is not jurisdictionally barred from resorting to the courts to challenge his union and employer, then no employee-grievant will be barred and the labor relations clock will be turned back more than a half century.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Dated: January 9, 1996.

Respectfully Submitted,

PATRICIA L. KASSCHAU
Counsel of Record

T. WARREN JACKSON
Of Counsel

Attorneys for Respondent
HUGHES AIRCRAFT COMPANY

APPENDIX A

T. Warren Jackson [CSBN 77506]
Patricia L. Kasschau [CSBN 90617]
Hughes Aircraft Company
Bldg. C1, M/S A112
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, California 90080-0028
(310) 568-7243
Attorneys for Defendant
Hughes Aircraft Company

FILED
JAN 14, 1994
Clerk, U.S. District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTICT OF CALIFORNIA

WILLIAM T. SENTER
Plaintiff,
vs.
HUGHES AIRCRAFT COMPANY, ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553, a Labor Union, and DOES 1 through 25, Inclusive,
Defendants.

Case No. CV 93-2252 KN (CHKx)

[PROPOSED] JUDGMENT

DATE: November 29, 1993
TIME: 9:30 a.m.
CTRM: 3

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

Based upon the papers submitted in support of and opposition to the respective summary judgment motions filed by Defendants Hughes Aircraft Company ("Hughes" or the "Company") and Electronic Space and Technicians, Local 1553, AFL-CIO ("East" or the "Union"), this Court has found and adjudged as follows:

The Court determines that the following facts are not in material dispute:

1. Until his layoff on July 10, 1992, Plaintiff William T. Senter ("Senter") was employed by Defendant Hughes Aircraft Company ("Hughes" or the "Company") as a "Timekeeper A" in its Microelectronic Systems Division ("MSD") of the Industrial Electronics Group at its Rancho Santa Margarita, California, facility.

2. During his employment, Senter was a member of the Electronic and Space Technicians, Local 1553, AFL-CIO ("EAST" or the "Union"), and the terms and conditions of his employment were governed by a collective bargaining agreement entered into between Hughes and the Union (the "Southern California Agreement"). The Southern California Agreement covers the bargaining unit of "all production, maintenance, shop clerical employees employed in factory areas, and all employees in the job classifications listed in the Appendices of this Agreement and who are employed by its El Segundo, Fullerton, Newport Beach, Rancho Santa Margarita, Malibu, Torrance, Canoga Park, Long Beach, Irvine area plants, and the Corporate Headquarters located in Los Angeles, California, and referred to in the NLRB certifications and applicable orders and agreements." "Timekeeper A" is one of the job classifications listed in the Appendix of job classifications for the Industrial Electronics Group.

3. Hughes' Industrial Products Division and the Hughes Technology Center entered into a second separate collective bargaining agreement with the Union covering employees in Carlsbad, California (the "Carlsbad Agreement"). The bargaining unit under the Carlsbad Agreement is defined as "all factory production, maintenance, and warehouse employees as listed in Appendix "C" of this Agreement and who are employed by its Carlsbad, California Area plants of the Industrial Products Division, and Hughes Technology Center, Hughes Aircraft Company, and referred to in the NLRB Certification in Case Number 21-RC-6197 and the applicable NLRB Order and Consent Election Agreement." Timekeeper is not listed in the covered job classifications in the Carlsbad Agreement Appendix.

4. Article II, Section B of the Southern California Agreement specifically states, *inter alia*, that: "Provided such does not violate other terms of this Agreement, Management shall have the right . . . to determine the extent to which the Plants or any unit of the Plants shall be operated or shut down."

5. In late 1991 or early 1992, Hughes informed the Union of its decision to move the MSD product lines from Rancho Santa Margarita to Carlsbad. Hughes informed the Union that its decision was based on the high costs of operating the Rancho Santa Margarita facility, the shrinking market for MSD product lines and the greater efficiencies that would result from combining similar product lines in a single facility. Hughes intended to integrate fully the two workforces at the Carlsbad facility and to merge the two bargaining units under the Southern California Agreement and the Carlsbad Agreement into one.

6. Thereafter, representatives from Hughes and the Union met to negotiate over the effects of Hughes' decision to shut down its Rancho Santa Margarita

facility. These negotiations focused primarily on the following issues: (1) protecting the seniority rights of the Rancho Santa Margarita bargaining unit employees transferring to Carlsbad; (2) determining who would be transferred to Carlsbad; and (3) integrating the job classifications and wage structures of Rancho Santa Margarita and Carlsbad. Hughes proposed, and the Union eventually agreed, that for purposes of efficiency, certain "support" job classifications would not be transferred to Carlsbad because they would duplicate functions already performed by Carlsbad employees. Timekeeping was one of the "support" job classifications that was not going to be transferred to Carlsbad. In addition, Hughes informed the Union that it would not transfer Rancho Santa Margarita electrical and plant maintenance employees because those functions already were being performed by Carlsbad employees.

7. As a result of these negotiations, Hughes informed Senter in March 1992 that he would not be transferred to Carlsbad but instead would be laid off.

8. Thereafter, but proper to his layoff, Senter filed a grievance under the Southern California Agreement. Hughes denied the grievance as premature because Senter had not yet been laid off.

9. Senter was laid off on July 10, 1992. Senter was one of 79 bargaining unit employees who were laid off and not trasferred to the Carlsbad facility.

10. Shortly after his layoff in July 1992, Senter filed another grievance in which he alleged that Hughes had violated the Southern California Agreement by laying him off because his timekeeping position, a bargaining unit job under the Southern California Agreement, was being performed by a nonbargaining unit employee at Carlsbad. Accordingly, Plaintiff sought a transfer to Carlsbad.

11. The Union filed and processed Senter's grievance against Hughes. In accordance with the terms of the grievance procedure outlined in the Southern California Agreement, the Union met with Hughes on July 30, 1992, for the "Step Two" Meeting. Thereafter, on August 15, 1992, the Union met with Hughes for third step "informal arbitration."

12. After considering the arguments, Highes denied Senter's grievance for the following reasons: (1) after the MSD operations were transferred, no need existed for a full-time timekeeper at the Rancho Santa Margarita facility; (2) nothing in the Southern California Agreement precluded Hughes from shutting down the Rancho Santa Margarita facility and moving its MSD operations to Carlsbad; (3) no provision in the Southern California Agreement required Hughes to transfer Senter to Carlsbad when the MSD operations were moved; and (4) timekeeping was not a bargaining unit classification at the Carlsbad facility.

13. Plaintiff's grievance was processed through three of the four steps of the grievance and arbitration process under the Southern California Agreement. The Union had the right to take Plaintiff's grievance to the fourth step by requesting formal arbitration, but Hughes received no such request and, accordingly, Plaintiff's grievance was never arbitrated. Notwithstanding, the Union appealed again to Hughes to transfer Senter to Carlsbad to handle the additional timekeeping requirements created by the merger. Hughes informed the Union that it did not require an additional timekeeper because it already had a timekeeper in Carlsbad and only 55 Rancho Santa Margarita employees were being transferred.

14. On March 17, 1993, Senter filed this action in state court alleging causes of action for breach of the collective bargaining agreement against Hughes, breach

of the duty of fair representation against the Union, and conspiracy to deny rights under the collective bargaining agreement against both Hughes and the Union. In April 1993, Senter amended his complaint to add a fourth cause of action for violation of California Labor Code Sections 923 and 1122 against both Hughes and the Union.

15. In April 1993, the action was properly removed to federal court on the ground that the amended complaint states a cause of action under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.

16. Hughes and EAST each moved for summary judgment. Senter opposed both motions.

17. Any finding of fact properly deemed a conclusion of law shall be incorporated by reference as though fully set out as a conclusion of law.

Based upon the above findings of fact as to which this Court finds no material dispute exists, this Court makes the following conclusions of law:

18. Summary judgment properly should be entered when "There is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. Rule 56(c). A dispute as to a material fact is "genuine" ony "if the evidence is such that a reasonable jury could return a verdict for the moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

19. Plaintiff's purported state law claims alleged against Hughes for "Breach of Collective Bargaining Agreement as a Third Party Beneficiary" and "Conspiracy to Deny Rights Under a Collective Bargaining Agreement" implicate his alleged rights under the Southern California Agreement and thus properly are recharacterized as claims under Section 301 of the

LMRA, over which this Court properly exercises jurisdiction. *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980) ("all rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce arise under Federal law . . . state law does not exist as an independent source of private rights to enforce collective bargaining agreements" [citation omitted]); *see also Casteneda v. Dura-Vent Corp.*, 648 F.2d 612, 618 (9th Cir. 1981) ("jurisdiction exists under section 301 only to the extent that the dispute is focused upon and governed by the terms of the collective bargaining agreement").

20. Senter's purported cause(s) of action alleged against Hughes for "Violation of California Labor Code Sections 923 and 1122" are *in pari materia* (*see Chavez v. Sargent*, 52 Cal.2d 162, 205 (1959)) and allege that Hughes "supported, financed, interfered with, dominated and/or controlled" the Union during the negotiations concerning the merger of Rancho Santa Margarita and Carlsbad work forces. The Court concludes that this cause of action essentially alleges that Hughes engaged in unfair labor practices under Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 ("NLRA"), and, accordingly, this Court has no subject matter jurisdiction over this claim. *Casteneda, op. cit.*, 648 F.2d 616, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) ("[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . .").

21. Hughes prevails as a matter of law on Senter's claim under Section 301 for breach of the collective bargaining agreement because Senter failed to exhaust his remedies under the Southern California Agreement by not proceeding through formal arbitration on his grievance or, alternatively, failed to demonstrate that he

was excused from exhausting his remedies under the Southern California Agreement because of a breach of the duty of fair representation on the part of the Union. *See Fristoe, op. cit.*, 615 F.2d at 1214-15; *Casteneda, op. cit.*, 648 F.2d 617 ("While employees may sue their employer for breach of a collective bargaining contract[,] . . . employees must attempt to exhaust the contractual grievance procedures before seeking judicial relief."); *Vaca v. Sipes*, 386 U.S. 171, 184, 186 (1967) ("the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance").

22. Even if Senter's claim against Hughes for breach of the collective bargaining agreement were properly entertained by this Court, Hughes would prevail as a matter of law on the claim because Senter can demonstrate no contractual right under either the Southern California or Carlsbad Agreements to perform the timekeeper function at Carlsbad.

23. Hughes prevails as a matter of law on Senter's conspiracy claim alleging that "Hughes and the Union . . . consented, agreed, and conspired with one another to deprive and deny [Senter] the rights, privileges and benefits which accrued to him under the collective bargaining agreement at issue in this lawsuit," because Senter failed to exhaust his remedies under the Southern California Agreement and he failed to demonstrate that any of his collective bargaining rights were violated in fact. Accordingly, Plaintiff cannot and has not presented any credible evidence in support of this claim.

24. Any conclusion of law properly deemed a finding of fact shall be incorporated by reference as though fully set out as a finding of fact.

Based upon the foregoing findings of fact and conclusions of law, the Court has concluded that no genuine issue of material fact exists. Accordingly,

IT IS HEREBY ORDERED THAT judgment be entered in favor of Defendant Hughes Aircraft Company and against Plaintiff William T. Senter.

DATED: January 14, 1994

David V. Kenyon
David V. Kenyon
United States District Judge

Respectfully submitted by:

/s/ Patricia L. Kasschau
Patricia L. Kasschau
Attorney for Hughes Aircraft Company

APPENDIX B

Patrick T. Connor, Bar # 89136
a member of
DE CARLO, CONNOR & SELVO
A Professional Corporation
500 South Virgil Avenue, Fourth Floor
Los Angeles, California 90020-1430
(213) 738-7959
Attorneys for Defendant Electronic
and Space Technicians Local 1553

FILED
JAN 14, 1994
Clerk, U.S. District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTICT OF CALIFORNIA

WILLIAM T. SENTER, an individual,
Plaintiff,

vs.

HUGHES AIRCRAFT COMPANY, a Delaware corporation; ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553, an unincorporated association,
Defendants.

Case No.: CV 93-2252 KN (CHKx)

JUDGEMENT [PROPOSED]

AFTER CONSIDERING THE PAPERS SUBMITTED, in an Order dated December 15, 1993, the Court granted defendant Electronic and Space Technicians Local 1553's (the "Union") motion for summary judgement, finding as follows:

1. Plaintiff William T. Senter ("Senter") failed to establish a genuine issue as to any material fact;

2. Senter's state law claims arise under the collective bargaining agreement between the Union and his employer Hughes Aircraft Company ("Hughes") and are preempted by Section 301 of the Labor Management Relations Act;

3. Senter's claim that the Union and Hughes violated California Labor Code Sections 923 and 1122 is preempted by the National Labor Relations Act and the National Labor Relations Board has exclusive jurisdiction over such claims;

4. The Union did not breach its duty of fair representation to Senter because the Union did not handle his grievance improperly and the Union's decision not to pursue Senter's grievance to arbitration was not arbitrary, discriminatory, or in bad faith; and

5. Senter's claim alleging that the Union and Hughes conspired to deprive him of his rights under the collective bargaining agreement fails because Senter's bargaining rights were not violated and Senter presented no credible evidence to raise a genuine issue of material fact regarding this claim.

Accordingly, there being no genuine issues of material fact, and the Union being entitled to judgement as a matter of law, Judgement is entered in favor of defendant Electronic and Space Technicians Local 1553 and against plaintiff.

Dated: January 14, 1994

David V. Kenyon
United States District Judge

APPENDIX C

HUGHES

Agreement

between

Hughes Aircraft Company

and

Electronic and
Space Technicians

Local 1553 AFL-CIO

Effective November 2, 1991
to November 5, 1994

[Excerpted from page 4.]

* * *

c. Comply with Plant rules and regulations.

d. Cooperate to keep at a minimum the time devoted by Officers, Stewards and members in handling grievances.

e. Not solicit Union members, Union dues or engage in other Union activities on Company property during working hours, unless specifically authorized by this Agreement.

Section B. Right to Manage the Plant

1. The management and operation of the Plants, administration of the Employer's business and direction of the working force are exclusive functions of Management. Provided such does not violate other terms of this Agreement, Management shall have the right to increase, decrease or rotate the working force; to hire, promote, demote, discharge or discipline for cause; to transfer or reclassify employees; to originate merit raises and determine merit ratings; to assign personnel to shifts, overtime and special work requirements; to establish work processes, standards, shifts, schedules and methods; to plan, route and schedule production; and, to determine the extent to which the Plants or any unit of the Plants shall be operated or shut down.

2. The above enumeration of Management's functions shall not exclude others not enumerated.

Section C. Separability

1. It is agreed between the parties that should any Article or portion of an Article of this Agreement be declared invalid, or modified in any way by legally-constituted authority, including any government agency having jurisdiction, all remaining Articles and portions of Articles shall continue in effect.

Section D. Waiver

1. The waiver by either party of one or more breaches of the obligations of the other party under the Agreement shall not constitute a waiver of any other or further breach of said obligation.

Section E. Successor or Assignee

1. This Agreement shall be binding on any successor or assignee of all or a major part of the Employer.

APPENDIX D

HUGHES

Agreement

between

Hughes Aircraft Company

and

Electronic and
Space Technicians

Local 1553 AFL-CIO

Effective November 2, 1991
to November 5, 1994

[Excerpted from page 123.]

* * *

Supplemental Agreement #11

November 2, 1991

Electronic and Space Technicians
Local #1553, AFL-CIO
13144 S. Prairie Avenue
Hawthorne, CA 90250

Attention: C. J. Jackson, President

Dear Mr. Jackson:

Pursuant to our discussion during contract negotiations, this will confirm our understanding concerning facilities which may be opened in the San Diego area.

The Company agrees that in the event it may hire or transfer employees in the bargaining unit classifications to any facility established in the San Diego area, it will offer EAST, Local #1553, the opportunity to represent them, on the same basis as all other bargaining unit employees covered by the current Collective Bargaining Agreement.

APPENDIX E

HUGHES

Subsidiary of GM Hughes Electronics
Corporate Offices: 7200 Hughes Terrace
PO Box 45066, Los Angeles CA 90045-0066
(213) 568-7200

February 7, 1992

Mr. C. J. Jackson
Electronic & Space Technicians
13144 South Prairie Avenue
Hawthorne, CA 90250

Dear Mr. Jackson:

Hughes Aircraft Company proposes that the Collective Bargaining Agreement (CBA) for our Carlsbad, California facility, expiring June 27, 1992 be adopted "en toto" as an addendum to EAST Local #1553 Collective Bargaining Agreement which was effective November 2, 1991 and expires November 5, 1994.

It is further proposed that such adoption would change the effective date of the Carlsbad CBA to be the same as the Local #1553 CBA described in the foregoing paragraph.

With respect to EAST jurisdiction at Carlsbad, such jurisdiction shall continue as described in the current Carlsbad Agreement.

This jurisdiction includes any work performed by EAST Local #1553 members for Light Valve Products, Inc. (LVPI) at the Carlsbad, CA area plant facilities set forth in the Carlsbad CBA. However, it is understood that the Union is agreeable to developing classifications for

LVPI which incorporates teaming and job combinations relevant to LPVI's operations.

While the Carlsbad Agreement has been adopted "en toto" it is the parties intent to integrate the language of the two (2) CBA's by August 1, 1994 and thereby modify the Carlsbad CBA during this time period. To this end, a steering committee is established consisting of the Corporate Human Resource Director, Corporate Manager of Labor Relations, President of EAST Local #1553 and Jim Bernsen, Administrative Assistant for the District Council of Carpenters.

Reporting to this committee shall be a sub committee composed of the HR Managers representing HTC and IPD or their designees, an EAST Local #1553 Business Agent and a Senior Steward. This sub committee may also have other representatives of their choosing as needed.

It will be the charge of this sub committee to make recommendations to the steering committee for eliminating the language differences between the two (2) CBA's.

Hughes Technology Center proposes that the Integrated Circuit Processor Sr. LG 06 be upgraded to LG 05 effective February 1, 1992.

Effective with the acceptance of this proposal the new title Classification Appendix, Application of Job Classification, effective March 1, 1992, will be incorporated into the Carlsbad CBA.

The Company proposes that wage increases shall be as set forth in Article IV attached. The Company is also proposing a job combination for IPD contained as a separate document attached.

It is our desire that all of the foregoing be presented to Local #1553 Carlsbad, CA membership on or before February 15, 1992 for a ratification vote.

Very truly yours,

/s/ Kenneth W. King
Kenneth W. King
HUGHES AIRCRAFT COMPANY
Manager, Labor Relations
Corporate Human Resources

Attachments

cc: D. Kulchin
T. Magness
R. G. Parke, Jr.
B. J. Wilson
EAST FILE

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Pasadena Office
APR 03 1995
Cathy A. Catterson
Clerk, U.S. Court of Appeals

WILLIAM T. SENTER
Plaintiff / Appellant
vs.
HUGHES AIRCRAFT COMPANY
Defendant / Appellee

CA: 94-55359
DC: CV-93-02252-Kn
CENTRAL CALIFORNIA

ORDER

Before: NOONAN, O'SCANNLAIN and LEAVY,
Circuit Judges

Appellant's motion to submit this case on the briefs is granted. The case will be submitted on the briefs and record on Monday, April 3, 1995, in Pasadena, California.

(3)

No. 95-898

Supreme Court, U.S.
FILED
JAN 23 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

WILLIAM T. SENTER,

Petitioner,

vs.

HUGHES AIRCRAFT COMPANY, and
ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553
a Labor Union,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

ERIKA W. SENTER
Attorney at Law
4199 Campus Drive
Suite 700
Irvine, California 92715
tel (714) 854-5309
fax (714) 854-4897

Counsel of Record
for Petitioner
William T. Senter

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The second grievance, filed after the layoff, which in addition to grieving the "layoff," incorporated all of the first grievance. . . . . Reply App. 5

REPLY APPENDIX "C"

The Southern California Agreement, page 1, which defines the "Employer" and defines the "Bargaining Unit." . . . Reply App. 7

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The Carlsbad Agreement, title page and page 1, which defines the "Employer" and defines the "Bargaining Unit." . . . Reply App. 8

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No. 95-898

In The

Supreme Court of the United States

October Term, 1995

WILLIAM T. SENTER,

Petitioner,

vs.

HUGHES AIRCRAFT COMPANY, and
ELECTRONIC AND SPACE TECHNICIANS LOCAL 1553
a Labor Union,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

PETITIONER'S REPLY BRIEF

—o—

Respondent's ("Hughes") arguments highlight and underscore why the Court should grant the Petition.

"If it ain't broke, don't fix it!" Hughes urges. (Opp. 19.) Yet, with the amazing admission that follows this bit of bravado, Hughes illustrates precisely how and why the "fair representation" scheme of labor-management grievance procedures that the Court envisioned in *Vaca v. Sipes*, 386 U.S. 171 (1967), is broken and needs "fixing" to update it to the 1990's reality of corporate mergers, plant closures, work force downsizing, and quiescent labor unions.

The case under review arose out of Petitioner's ("Senter") loss of his job on July 10, 1992. The loss of the job (like so many millions of other jobs lost in the 1990s) resulted from a company *merger* which *downsized* the work force and *closed* a plant. In this case, the labor-choking merger was achieved by consolidating two divisions of Hughes Aircraft Company. The product lines and work force where Senter worked were moved to the location of the other division (Carlsbad), and the separate bargaining unit agreements ("CBA") of the two divisions were united by assimilating the "Carlsbad Agreement" into the CBA which covered Senter's job, that is, the "Southern California Agreement." (See, Opp. E1-E3.) Senter lodged two grievances with his union, against Hughes, in an effort to fight the downsizing-away of his contractually guaranteed, union protected, job. The union processed each grievance through several steps, but then aborted the procedure before proceeding to arbitration.[1] Thereupon, Senter brought his grievance to court.

---

1. The content of the two grievances are appended hereto as Reply Appendix "A" and "B" respectively. The first grievance (Reply Appendix "A," Reply App. 1-4) was filed three months before Senter's layoff took effect. It grieved Hughes' decision to "delete" Senter's job classification from the bargaining unit. The grievance process on this first grievance was aborted at Step 2 when Hughes and the union proclaimed the grievance to be "premature." After the layoff on July 10, 1992, the job classification deletion grievance was renewed and incorporated into a second grievance (Reply Appendix "B," Reply App. 5-6) which grieved the layoff on the basis of non-union employees performing bargaining unit work. The grievance process on the second grievance was aborted after processing it through step *three* of the four-step procedure (Opp. 5; accord, Pet. 9).

The pretext asserted for abandoning the second grievance, after pursuing it through *three* steps, is that the union had determined that the grievance had "a lack of merit." To wit, the union president and the union business agent averred in declarations to the trial court that: "Due to its finding of a lack of merit regarding Senter's grievance, the Union's Executive Board determined that it would not pursue Senter's grievance to arbitration."

I. Hughes' Astounding Admission, That Senter's Employment Fate At Hughes Had Already Been Decided In "Negotiated" Agreements With The Union *Before* The Grievance Process Over The Right To Keep His Job Ever Began, Reveals That The Labor Law Policy Envisioned In *Vaca vs. Sipes* Is Indeed "Broke" And Needs "Fixin." The Court Now Has The Opportunity To Send A Message That The Mere Staging Of A Phony Grievance Process Does Not Constitute "Fair Representation."

In describing how Senter's collective bargaining unit job was *downsized* away with the quiescence of the union, Hughes admits that the job was already "bargained" away by the union in negotiations over the *merger* before Senter ever grieved his job loss. To wit, Hughes acknowledges (at Opp. 20):

> Hughes and the Union bargained over the effects of the [facility] closure and agreed to negotiate the eventual merger of the bargaining units under a single collective bargaining agreement by 1994 (Pet. 6-7; Opp. App. E1-E3). The Union sought many things from Hughes while bargaining over the effects of the closure of Petitioner's facility, and Hughes sought a number of concessions from the Union. In the end, there were compromises on both sides. The Union gained seniority and grandfathered wage protections for those workers transferring to Carlsbad, but did not prevail on transferring Petitioner and other support personnel with the product line (Opp. App. A4). When Petitioner filed a grievance [sic], the Union processed it vigorously through three steps . . .

In other words, with full knowledge that Senter's employment fate had already been decided between them, both the union and Hughes pretended to conduct "grievance proceedings" over Senter's claimed right to keep his job.

With the outcome of the grievances foreordained by the *merger*

negotiations,[2] the steps of going through the various proceedings, required by the CBA to grieve a violation of the contract, were empty "show trials" reminiscent of those conducted by authoritarian societies where they "pretend" to engage in a fair proceeding. Such sham hearings are a mockery of the "fair representation" procedures that this Court envisioned in 1967 when it decided *Vaca vs. Sipes*.

Even assuming, *arguendo*, that the union had, under the guise of *merger* negotiations, the legal right to negotiate away Senter's collectively bargained for contract right (which Senter denies), what purpose is served in processing his layoff grievance through **three** grievance steps (Reply App. 5-6), if the union had already agreed that Senter's job would not be transferred to Carlsbad?

Moreover, what possible purpose is served in engaging in **any** grievance hearings on Senter's initial grievance (Reply App. 1-4), which grieved the decision to "delete" his job classification from the bargaining unit, and then disposing of said grievance as "premature," if it was already decided, and agreed to, that Senter's job classification would no longer be in the bargaining unit after the move to Carlsbad? [The Court's attention is respectfully drawn to the fact that his initial grievance expressly addresses the issue of why Senter's job cannot be simply "negotiated" away under the CBA (Reply App. 2-3).]

For that matter, how fair a representative of Senter's interests, how good an advocate for his claims, can the union be in the grievance process, and at the grievance hearings, when the union had already "negotiated" away the job over which Senter grieves?[3]

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2. The merger negotiations were not conducted openly and were not subject to the scrutiny of those whose fate was being determined. Rather, Hughes and the Union decided on the effects of the merger in unrecorded meetings informally held in various undisclosed restaurants and kept "secret" from the rank and file union membership (Pet. 6).

3. In his declaration to the trial court, filed in opposition to the summary judgment motions, Senter catalogued the various ways in which the union had demonstrated its lack of loyalty to him and its lack of proper advocacy in the grievance process. He also averred that he had been specifically and expressly "warned by the union that [he] would not be allowed to have an attorney accompanying [him] in the grievance meeting."

The only conceivable purpose for conducting such (sham) grievance proceedings is to prevent the aggrieved employee from having his "day in court" under the rule of *Vaca vs. Sipes.*

When faced with an employee's grievances over a job that has already been "negotiated" away by an emasculated labor union, staging phony grievance hearings serves only to shield (and improperly so) the devious and erring employer from the just effects of a breach of a collective bargaining agreement.

The scheme Hughes employed to circumvent its existing contract promises to its unionized work force, when it had *merger* and *downsizing* the labor force in mind, is a perversion of both the letter and the spirit of the law laid down in *Vaca vs. Sipes.* To the extent that the scheme was successful, it signals that the historic labor policy of "fair representation" through the union grievance process, which served the country well in an earlier age, no longer works as it should in the context of the modern labor-management situation.

Hughes asserts that Senter "is swimming upstream" with his Petition, because so few cases of unfair representation have reached this Court (Opp. 19). Senter respectfully submits that perhaps this is so because, when proceeding in the unscrutinized grievance process, unions and employers have been successful in hiding many sins behind the mantra of "fair representation." A more precise definition of what constitutes unfair representation in a union's handling of an employee's grievance is needed.

However, without a doubt, the principal reason why so few complaints about unfair labor union grievance proceedings against employers receive review by this Court is because of the many nearly insurmountable obstacles that obstruct an aggrieved, unionized employee's road to judicial examination. Very rarely does the lowly wage-earner have the means, either financial or otherwise, to bring his cause to the court, let alone to sustain that cause all the way to the Supreme Court, against the combined forces and, often vast, resources of both the union and the employer.

As a result of the difficulty in bringing a case such as this to the courts, the opportunities to provide guidance on when, in the context of the modern labor-management relationship, the employee-grievant is jurisdictionally barred from challenging his employer in court are

few. This case presents such an opportunity, and the Court should take it.

II. The Court Should Grant The Petition Because The Right To A Fair Hearing Cannot be Abridged. Respondent's Claim That The Court of Appeals Decided The Case Fairly, On Evidence Presented In the Record, Is Not Grounded In Fact.

With the arrogance reminiscent of how Hughes treated the grievance hearings concerning Senter's right to a job, it now glosses over Senter's charge that his Constitutionally protected right to a fair hearing in the Ninth Circuit Court of Appeals has been abridged by not having been given the opportunity to brief the court on the points upon which his case was decided. Hughes says: "The Ninth Circuit's decision, even if wrongly decided, has a very circumscribed effect, indeed, limited to Petitioner alone. No legal issues of broad import are involved here."

The right to a fair hearing, to a fair procedure, is Everyman's right -- or, at least -- is every American's right. The question of whether a court of law has abridged that right is of broad import, indeed.

Significant is the fact Hughes does not deny Senter's assertion (at Pet. 11) that:

> The [Ninth Circuit Court of Appeals] determined, *sua sponte*, without asking for briefing from the parties or hearing argument on the point, that the CBA "does not vest rights in employees by virtue of a particular division they work for, but rather by virtue of their being employed at a particular Hughes plant." ([Pet.] App. 3).

Nor does Hughes dispute Senter's claim (at Pet. 11) that:

> This *sua sponte* finding and conclusion by the appeals court is not only plainly erroneous and is without any substantiation in fact, it is also in contradiction to the

admitted conduct of the parties and the agreed facts of the case.

Rather, Hughes defends the appeals court decision by ignoring the plain language of the explanation the court gives for its ruling (Pet. App. 3), and speculates, instead, on what the Ninth Circuit might have decided had it entertained the arguments Senter presents, and considered the issues Senter raises, in his denied Petition for Rehearing (Pet. App. 18-31).

Hughes ruminates that: "The Ninth Circuit certainly is fully capable of reading the plain language of the Agreement and ascertaining that the "Carlsbad" facility . . . is not a facility where [Senter] has any exercisable contract rights." And, supposes that: "Similarly, the Ninth Circuit is capable of reading the Supplemental Agreement #11 . . . and ascertaining that it has no bearing on the case because Carlsbad is not a (1) new and (2) non-union location." And, speculates that: "Likewise, the Ninth Circuit competently could determine from reading the collective bargaining agreement in the record that Carlsbad did not constitute a "successor" or "assignee" under their provisions or applicable federal labor law." (Opp. 14).

Hughes' speculations on what the Ninth Circuit might have ruled are just that, speculations. Moreover, Hughes' ruminations are not grounded in fact; nor are they supported by the evidence on the record.

It is an undisputed fact that the Southern California Agreement operated in Carlsbad *after* the move. Therefore, arguments over whether the successorship clause applies, and/or whether Supplemental Agreement #11 applies, to give Senter contract rights at Carlsbad, are all rendered moot. Hughes and the union agreed that the CBA applies in Carlsbad. Senter cannot, rightfully, be excluded from that agreement.

Even if, *arguendo*, Senter cannot look to the merger agreements for his contract rights in Carlsbad, such rights, indeed, do flow to him also from the "Successor" clause in the Southern California Agreement (see, Opp. C3). Hughes' argument that the successorship provision has no application to this case, because the provision

applies, not to divisions of Hughes, but "only if an entity other that Hughes assumes control" (Opp. 7), smacks of Orwellian "doublethink." The argument also flies in the face of the plain facts.

To wit, the "Successor" clause in the Southern California Agreement expressly acknowledges that the "Employer" (Hughes Aircraft Company) has severable *parts* (divisions) that can operate apart from the whole. The provision states: "This Agreement shall be binding on any successor or assignee of all or a major *part* of the Employer." It is not disputed that *something less than all* of Hughes Aircraft Company was Senter's employer under the terms of the Southern California Agreement. See, Reply Appendix "C" (Reply App. 7). The Carlsbad Agreement is in accord. By contract definition, the "Employer" in the Carlsbad Agreement is restricted to the "Industrial Products Division" and the "Hughes Technology Center" *part* of Hughes Aircraft Company. See, Reply Appendix "D" (Reply App.8-9).

Senter has no rights under the Carlsbad Agreement, Hughes professes. Ergo, the divisions of Hughes that operated in Carlsbad were not the employer of Senter. It follows, as night follows day, the two employers are not the same. Therefore, when the Carlsbad employer *merged* its operations with those of the employer of the Southern California Agreement, the "Successor" clause applied to bind the Carlsbad employer to the provisions of the Southern California Agreement.[4]

The arguments concerning the non-applicability of Supplemental Agreement # 11 (Opp. D2) are equally Orwellian. The Agreement offers the union the "opportunity" to represent employees hired in, or transferred to, the San Diego area. Hughes says that the Agreement "has no bearing on this case" because Hughes did not transfer the workers to a "new" and "non-union" facility (Opp. 8, 14).

Hughes' professed understanding of what it meant by Supplemental Agreement # 11 is again a surprising admission, which signals that the traditional constraints the law imposes on the labor-managment relationship may no longer be securely in place. Is not an agreement by an employer to give assistance to a union in organizing

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4. The Carlsbad Agreement does not have a successorship clause.

employees an unfair labor practice? Is not such an agreement an unlawful collusion between labor and management? Is the duty of loyalty that a union owes its members not compromised by such an agreement?

Also, Supplemental Agreement #11 was made very shortly before the merger was announced.[5] Why would Hughes make an agreement concerning transfers of workers to "new" facilities, when it intended all along to transfer the workers to an "existing" facility?

But, putting aside these interesting questions, Hughes' assertion of what it meant by Agreement # 11, at best, creates an ambiguity which, in the summary judgment setting, cannot be resolved in Hughes' favor. An ambiguity in the agreement exists if it can be read to mean, as Hughes argues, that the "may be opened" language in the first paragraph does not mean to "any facility established in the San Diego area" as is stated in the second paragraph, but means, instead, that the facility must be "new" and must be "non-union."

Senter understands the agreement differently. It is also reasonable, and entirely possible, that the union understood the agreement to cover the move to Carlsbad, and intended it to mean so.

It is hornbook law that ambiguities in a contract are resolved against the maker. However, if the inconsistent language in the agreement cannot be reconciled by interpreting the inconsistency against Hughes, then resolving the ambiguity involves determining what the intentions of the parties were, and such a determination cannot be made by summary judgment, for the issue is one of fact.

It is, therefore, highly unlikely that the Ninth Circuit would have adopted the position Hughes urges. A remand order, so the court below can adjudicate these matters fully, is appropriate.

_____o_____

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5. The date of Supplemental Agreement #11 is November 2, 1991. In late 1991 or early 1992, Hughes informed the union of its decision to consolidate and merge operations and move its product lines from its plant in Rancho Santa Margarita to its plant in Carlsbad (Pet. 6).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

JANUARY 18, 1996

Respectfully submitted,

ERIKA W. SENTER
Attorney at Law
4199 Campus Drive
Suite 700
Irvine, California 92715
tel (714) 854-5309
fax (714) 854-4897

Counsel of Record
for Petitioner
William T. Senter

REPLY APPENDIX "A"

RE: EMPLOYEE GRIEVANCE OF:

EMPLOYEE: WILLIAM T. SENTER
JOB TITLE: TIMEKEEPER A
JOB CODE: 95303
DATE: MARCH 18, 1992
SUBJECT: LETTER OF LAYOFF OF MARCH 16, 1992

The current Bargaining Unit Agreement between Hughes and Local 1553 (at preamble thereto on page 1 thereof) expressly provides that "timekeeper" is to be a bargaining unit classification. However, the "Letter of Layoff" delivered to WILLIAM T. SENTER on March 16, 1992 announces, in effect, that IEG plans to eliminate that bargaining unit job classification. Such a plan violates the bargaining unit agreement and constitutes a breach of Article II, Section F (1) of said contract, which provides:

> The Employer agrees that salaried and other non-bargaining unit employees **shall not** perform work regularly assigned to Bargaining Unit employees, except in cases of emergency, job instruction, developmental work, or to alleviate production difficulties. This section is not to be used to circumvent the integrity of the bargaining unit classifications or the terms and conditions of the Agreement. (emphasis added.)

Thus, the regularly assigned duties of a Bargaining Unit timekeeper are not to be assigned to anyone outside this bargaining unit. Since Carlsbad does not have a Bargaining Unit timekeeper, and since the need for such timekeeping services will continue in Carlsbad after the merger is completed (because some 55 hourly jobs are also being moved), it follows that the function of a Bargaining Unit timekeeper cannot be lawfully eliminated.

At the election of the Employer, a Bargaining Unit timekeeper is, however, permitted to perform all the functions of a salaried timekeeper. The reverse cannot be done.

Nor would the merged successor-employer in Carlsbad be permitted to create a new job classification to perform the same bargaining unit duties that WILLIAM T. SENTER now performs.

> Article IV, section I (5) states:
> A new Bargaining Unit Job Classification will not be added during the term of this agreement where an existing Job classification duplicates it to the extent of prescribing the identical duties and qualifications.

Supplemental Agreement #4 clarifies the intent of provision I (5) by explaining at paragraph 5:

> The splitting off of job duties from existing job classifications or the combining of existing job duties into new or revised job classifications and the establishment of a new job classification continues to be the function of Management. **However, if as the result of such action a job classification is established which then duplicates an existing job classification by prescribing identical duties and qualifications, it would be a violation of Article IV, Section I (5).** (emphasis added.)

The alleged justification that the Carlsbad Division has historically had a Bargaining Unit Contract which allowed a salaried employee there to perform the functions that are a bargaining unit classification here, is totally immaterial to the binding effect of the Agreement at hand, which expressly states at Article II, Section E (1) that: "This Agreement shall be binding on any successor or assignee of all or a major part of the Employer."

The News and Views published statement of February 28, 1992, signed by Bob Phelps and John Kolostyak makes it very clear that the new merged entity of MSD and IPD will indeed be the successor to the current employer in every sense of that word. The publication states: "We would like to reemphasize that this consolidation is not an absorption of MSD by IPD, but a merger of the two divisions. Employees of both divisions will be affected."

For all the reasons stated the announced termination of WILLIAM T. SENTER'S employment, as "Timekeeper A," and the elimination of his job function is a breach the bargaining unit agreement and a violation of his rights thereunder. He respectfully requests the decision to eliminate his job and not to offer him employment in Carlsbad be reversed.

signed: _____
WILLIAM T. SENTER

(The above grievance memorandum was submitted to the union for filing with the company. It was assigned Grievance No. RSM3-9208 and was received by the company on March 20, 1992. On the official "Grievance Form-Union Submittal- Step 2," which was filed with company, the union summarized and described the grievance as follows):

The company is in violation of articles two, four, eighteen, and supp. agreement #4.
I have received a notice of layoff. If I am laid off it will be improper and in violation of the above mentioned articles.
Reasons: (Please see attached documents).

Settlement: Cease and desist such discriminatory practices. Transfer me to Carlsbad as an hourly timekeeper.

/s/ WILLIAM T. SENTER — 03-19-92
Employee's Signature — Date

/s/ J.C. BIANCARDI — 3/20/92
Certified Steward's Signature — Date

(Because Senter did not charge Hughes with violating article 18 [the seniority provision], the following amendment was submitted to make certain that the nature of his grievance would not be misunderstood.)

RE: AMENDMENT TO EMPLOYEE GRIEVANCE OF:

EMPLOYEE:	WILLIAM T. SENTER
GRIEVANCE NO:	RSM3-9208
JOB TITLE:	TIMEKEEPER A
JOB CODE:	95303
DATE:	MARCH 28, 1992
SUBJECT:	LETTER OF LAYOFF OF MARCH 16, 1992

PLEASE TAKE NOTICE that I wish to amend my written grievance of March 18, 1992, submitted on my behalf by the Union on or about March 20, 1992, to correct an error that appears on the first page thereof.

The Union-provided form portion of my grievance (first page) incorrectly summarizes my grievance in that it provides that by failing to include me in that class of employees whose job functions are transferred to Carlsbad, I claim a violation of Article "eighteen" of the Union bargaining agreement. My correct grievance is as stated in the signed attachment to that form, and I make no charge that Article XVIII, the "seniority" provisions of the contract are violated in my case.

Rather, I base my grievance solely on the charge that my job function of "hourly timekeeper," is a bargaining unit job, which is unlawfully deleted and assigned to non-union personnel in direct violation of Article II, section (F)(1) of the contract. I further charge that the deletion of my "union job" is not needed or authorized by Article IV, and does not fall into the "management decision" exception of Letter # 4, because nothing prevents the company from continuing its present policy of also assigning to me the functions of a "salaried" timekeeper as it has done for the past two years, which job I have always performed in exemplary fashion.

/s/ WILLIAM T. SENTER
April 1, 1992

REPLY APPENDIX "B"

[official grievance form]

GRIEVANCE FORM
UNION SUBMITTAL
STEP NO. 2

Union Grievance No. RSM 7-9211 Date filed: 7/24/92
Name: WILLIAM T. SENTER Source No.: 94/02/10
Job Classification: TIMEKEEPER "A" Shift: 1
Supervisor: DAVE HOLMGREN Dept.Mgr.: RON PENLAND
Check One: xx EMPLOYEE GRIEVANCE

Provide details of grievance specifying event(s); including date and place of occurrence and article, section and paragraph allegedly violated:

The Company is in violation of Article I, section (C) (1); Article II, sections E (1) and F (1); Article IV, sections (I) (1) (3) and (5); Article XVIII, section (A) (1); Article XXIV, sections (B) (1) and (C) (1) Supplemental Agreements, nos. 4, 7, and 11 and all other applicable provisions of the Collective Bargaining Unit Agreement between Hughes and Local 1553 (hereafter,"CBA").
The violation is as follows:
On March 16, 1992 I received a "Letter of Layoff." On March 20, 1992 I filed a grievance (Union #RSM 3-9208; Company # 92-08) which is incorporated herein by reference as though set forth in full. The company failed and refused to consider and process such grievance on the alleged claim that the grievance was "premature." On May 1, 1992 I received a second "Letter of Layoff," whereupon I again insisted that my above stated grievance be considered. On May 5, 1992 the Company denied my grievance on the ground that no violation of the CBA had occurred. My repeated written requests to have the matter reconsidered and\or arbitrated (Letters to Mr. Conrad Santos, dated May 29 and June 23, 1992) which are also herein incorporated by reference as though set forth in full, were ignored and\or refused. On June 29, 1992, Legal Counsel for Hughes, Lidia A. Cossi notified me by letter that my layoff notices remained in effect because the Company was "adhering to the (Carlsbad) collective bargaining agreement currently in place." I was

not given a copy of any such alleged contract. On or about July 2, 1992 the RSM and Carlsbad divisions were consolidated and a new accounting and timekeeping system was installed. Many employees for whose time records I had been responsible were transferred to Carlsbad. A week later, on July 10, 1992 I was laid off. The reason given for such layoff was "lack of work." The RSM plant site has not yet closed, and a number of employees including bargaining unit and other hourly workers remain employed at RSM. All timekeeping duties which have been regularly and customarily assigned to me and performed by me pursuant to the CBA effective at RSM have been removed from me and assigned to non-bargaining unit employees.

Settlement:

1. Concede that the RSM CBA remains in full force and effect.
2. Cease using non-bargaining unit employees to perform bargaining unit work in timekeeping.
3. Reinstate me to my position as "Timekeeper A" and transfer me to Carlsbad with all lost wages, benefits and seniority; OR,
4. Compensate me for all lost income and all other lost benefits from the inception of my layoff through the life of the present contract and credit me for all company seniority which would have accrued to me and qualified me for early retirement at age 55.

Employee Grievance:

/s/ WILLIAM T. SENTER — 07/20/92
Employee's Signature — Date

/s/ JEFFIE JACKSON — 7/24/92
Certified Steward's Signature — Date

This section to be completed by the Company:

Company Grievance No. 9211

Signature of Receiving Superintendent/Employee Relations Representative.

/s/ CONRAD SANTOS — 7-22-92
Date Received

REPLY APPENDIX "C"

[entire page 1 of the "Southern California Agreement"]

AGREEMENT

Between
HUGHES AIRCRAFT COMPANY

and
ELECTRONIC AND SPACE TECHNICIANS
LOCAL 1553, AFL-CIO

Effective November 2, 1991
Expires November 5, 1994

THIS AGREEMENT is made and entered into in Los Angeles, California, this 2nd day of November 1991, by and between HUGHES AIRCRAFT COMPANY, a corporation, hereinafter referred to as the "Employer" and ELECTRONIC AND SPACE TECHNICIANS, LOCAL 1553, AFL-CIO, hereinafter referred to as the "Union."

BARGAINING UNIT

The Employer recognizes the Union as the sole and exclusive Bargaining Agent for all production, maintenance, shop clerical employees employed in factory areas, and all employees in the job classifications listed in the Appendices of this Agreement and who are employed by its El Segundo, Fullerton, Newport Beach, Rancho Santa Margarita, Malibu, Torrence, Canoga Park, Long Beach, Irvine Area plants, and the Corporate Headquarters located in Los Angeles, CA, and referred to in NLRB certifications and applicable orders and agreements. Excluded from the Bargaining Unit are all supervisors, all administrative, professional, engineering and office employees, confidential employees, all plant production and security employees, and all Department employees, except timekeepers, all welders and maintenance electricians.

REPLY APPENDIX "D"

HUGHES

Agreement

Between

Hughes Aircraft Company

Industrial Products Division

and

Hughes Technology Center

and

Electronic and Space

Technicians

Local 1553
AFL-CIO
March 4, 1989 through June 27, 1992

[entire page 1 of the "Carlsbad Agreement"]

THIS AGREEMENT is made and entered into at Carlsbad, California, this 4th day of March, 1989 by and between Industrial Products Division and Hughes Technology Center, of the HUGHES AIRCRAFT COMPANY, a corporation, hereafter referred to as the "Employer," and ELECTRONIC & SPACE TECHNICIANS, LOCAL 1553, AFL-CIO, hereafter referred to as the "Union."

BARGAINING UNIT

The Employer recognizes the Union as the sole and exclusive Bargaining Agent for all factory and production, maintenance and warehouse employees as listed in Appendix "C" of this Agreement and who are employed by its Carlsbad, California Area plants of the Industrial Products Division, and Hughes Technology Center, Hughes Aircraft Company, and referred to in the NLRB Certification in Case Number 21-RC-6197 and the applicable NLRB Order and Consent Election Agreement. Excluded from the bargaining unit are all engineering and office employees, all plant and office clerical, all research and development technicians, and all Finance Department employees and all technical employees not engaged in production.